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States, Territories, and Dependencies

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I. States

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West's Key Number Digest

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§ 67. Generally

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West's Key Number Digest

West's Key Number Digest, [States](#) 85, 87, 88

A State may acquire real or personal property by purchase, conveyance, gift,¹ or bequest,² and may hold such property for uses independent of public uses.³ In conducting transactions with respect to its land, a State acts in its proprietary capacity rather than a sovereign capacity and is subject to laws it prescribes for the conduct of its private citizens in transactions with respect to their property.⁴ The State has a right to control the use of its own property and to preserve the property under its control for the use to which it is lawfully dedicated.⁵

Once land has been acquired by a State in fee simple for public use, either by eminent domain or purchase or donation, the former property owner does not retain an interest in the land, and the public use may be abandoned or the land may be devoted to a different use without any impairment of the title acquired, absent fraud or bad faith at the time of conveyance.⁶

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Footnotes

- 1 [Adkins v. Kalter](#), 171 Ark. 1111, 287 S.W. 388 (1926).
- 2 [Mississippi Valley Trust Co. v. Ruhland](#), 359 Mo. 616, 222 S.W.2d 750 (1949).
- 3 [Tomlin v. Cedar Rapids & Iowa City Ry. & Light Co.](#), 141 Iowa 599, 120 N.W. 93 (1909).
- 4 [Cleveland Terminal & Valley R. Co. v. State ex rel. Atty. Gen.](#), 85 Ohio St. 251, 97 N.E. 967 (1912).
- 5 [Adderley v. State of Fla.](#), 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966); [Stover v. Prince George's County](#), 132 Md. App. 373, 752 A.2d 686 (2000).
- 6 [Mainer v. Canal Authority of State](#), 467 So. 2d 989 (Fla. 1985).

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§ 68. Property of agencies and subdivisions

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West's Key Number Digest

West's Key Number Digest, [States](#)  85

A State has an interest in the property of all of its political subdivisions and public authorities.¹

A state board that is empowered to take and hold the title to property for state purposes does not own that property in any proprietary sense; it is state property, just as if title were formally vested in the state.²

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Footnotes

- 1 [People ex rel. Hartigan v. E & E Hauling, Inc.](#), 153 Ill. 2d 473, 180 Ill. Dec. 271, 607 N.E.2d 165 (1992). Because a university was an agency of the State, any property owned by the university was, in effect, owned by the State. [Appeal of University of North Carolina](#), 300 N.C. 563, 268 S.E.2d 472 (1980).
- 2 [Winter v. Mackie](#), 376 Mich. 11, 135 N.W.2d 364 (1965); [Mississippi Valley Trust Co. v. Ruhland](#), 359 Mo. 616, 222 S.W.2d 750 (1949).

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§ 69. Sale or other disposition

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West's Key Number Digest

West's Key Number Digest, [States](#) 89

In the absence of constitutional or statutory restrictions, a State may sell or dispose of property that it holds in a proprietary capacity.¹ In the absence of any such restriction, a State may sell and dispose of its property on its own terms and conditions for cash or credit, and it may take, hold, and enforce obligations received from the purchasers of its property.² If there are competing buyers, the State may ordinarily choose to whom it will sell.³ However, the law prohibits a state agency from giving away public property for private use,⁴ and a statute permitting certain persons to buy state lands at a private sale, at a price less than could be obtained at a public sale, violates provisions against grants of special privilege and state donations to private persons.⁵

A state land sales act, including its competitive-bidding requirements, did not apply to a lease to another state institution.⁶ Conveyances of land not needed for a highway came within statutes allowing the sale through advertisement or direct negotiation,⁷ or to any state or local agency if the land is to be used for a public purpose.⁸

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Footnotes

- 1 [Herr v. Rudolf](#), 75 N.D. 91, 25 N.W.2d 916, 169 A.L.R. 1388 (1947); [Breck v. Janklow](#), 2001 SD 28, 623 N.W.2d 449 (S.D. 2001).
As to a State's disposition of unappropriated public lands, see [Am. Jur. 2d, Public Lands](#) §§ 40 et seq.
- 2 [Adkins v. Kalter](#), 171 Ark. 1111, 287 S.W. 388 (1926); [South San Joaquin Irr. Dist. v. Neumiller](#), 2 Cal. 2d 485, 42 P.2d 64 (1935).
- 3 [Herr v. Rudolf](#), 75 N.D. 91, 25 N.W.2d 916, 169 A.L.R. 1388 (1947).

- 4 [Lake Union Drydock Co., Inc. v. State Dept. of Natural Resources](#), 143 Wash. App. 644, 179 P.3d 844 (Div.
2 2008).
- 5 The State has a fiduciary duty under the state constitution to seek compensation for the use of state-owned
lands. [PPL Montana, LLC v. State](#), 2010 MT 64, 355 Mont. 402, 229 P.3d 421 (2010), certiorari granted
in part, 131 S. Ct. 3019, 180 L. Ed. 2d 843 (2011) and rev'd on other grounds and remanded, 132 S. Ct.
1215, 182 L. Ed. 2d 77 (2012).
- 6 [Herr v. Rudolf](#), 75 N.D. 91, 25 N.W.2d 916, 169 A.L.R. 1388 (1947).
- 7 [Gulf State Park Authority v. Gulf Beach Hotel, Inc.](#), 22 So. 3d 432, 251 Ed. Law Rep. 956 (Ala. 2009)
(portion of state park leased to state university; however, such a lease violated a state parks concessions act
by using the university as an intermediary to lease to a private developer of a conference center).
- 8 [K & A Acquisition Group, LLC v. Island Pointe, LLC](#), 383 S.C. 563, 682 S.E.2d 252 (2009).
- [Lovell Land, Inc. v. State Highway Admin.](#), 408 Md. 242, 969 A.2d 284 (2009).

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§ 70. Sale or other disposition—Effect of invalid disposition

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A State's action in selling land, which it had previously purchased, without complying with statutory provisions requiring publication of notice of the intended sale and requiring that the original owners be given an opportunity to meet the highest bid received, was unauthorized, rather than merely improper, and, thus, the State was not estopped from denying the validity of the resulting deed even though the failure to comply with the statute was due to the negligence of the State's agents.¹ On the other hand, a failure to notify an abutting landowner of the intent to sell state land did not render the sale void, given that the state agency was generally authorized to sell the surplus property, and this procedural failure to give notice did not contravene the policy underlying the statute to protect the public from fraud or collusion.²

If, as a result of defective condemnation proceedings, a State does not hold title to the property, it is incapable of transferring any ownership interest in the property, rendering a subsequent special warranty deed void.³

Voiding a lease of state land does not violate due process where the lease was executed in contravention of a statute.⁴

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Footnotes

1 [Norman v. State](#), 182 Mont. 439, 597 P.2d 715 (1979).

2 [South Tacoma Way, LLC v. State](#), 169 Wash. 2d 118, 233 P.3d 871 (2010).

3 [Smith v. Jackson State University](#), 995 So. 2d 88 (Miss. 2008).

4 [Kepoo v. Kane, 106 Haw. 270, 103 P.3d 939 \(2005\)](#) (also noting that the developers were afforded an opportunity to be heard throughout the litigation, and voiding the lease merely delayed the project pending compliance with statutory requirements and did not amount to a permanent deprivation).

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§ 71. Sale or other disposition—Construction and operation of grants, deeds, or leases

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[Am. Jur. Legal Forms 2d § 239:4](#) (Deed from state—On sale of state land)

[Am. Jur. Legal Forms 2d § 239:5](#) (Lease of state real property—Between state agencies—Premises within building)

[Am. Jur. Legal Forms 2d § 239:6](#) (Lease of state real property—Between state and nonprofit user of recreational path)

[Am. Jur. Legal Forms 2d § 239:7](#) (Lease of state property—To county or municipality—Provision—Rental to be paid from special tax)

A State may grant title by resolution if the resolution contains words of grant, release, or confirmation or a clearly expressed intent to make a conveyance of title at that time.¹

A State that sells or conveys property for a valuable consideration in its proprietary capacity is bound by the same rules that apply to contracts and conveyances by private persons.² An attempt by statute to convert a mere covenant in a state grant into a condition subsequent imposing a forfeiture for its violation unconstitutionally impairs the obligation of contract.³ The recitals in a conveyance by a state are ordinarily as binding on it as on a private person, and the state is presumed to have full knowledge of all facts recited in the conveyance.⁴

If a State grants public rights to an entity, it will be presumed to have conveyed no more than is necessary to achieve its purpose.⁵ Furthermore, a State is not presumed to have parted with any of its property in the absence of conclusive proof of an intention to do so, and any ambiguity must operate against the grantee and in favor of the public.⁶

When the rent for submerged land leased by the State to a private entity depends on the value of an upland parcel, a state agency may have the authority to substitute another parcel when determining that rent, where the first parcel was contaminated, and its assessed value in that condition was inconsistent with the purpose of the lease.⁷

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Footnotes

- 1 Boothbay Harbor Condominiums, Inc. v. Department of Transp., 382 A.2d 848 (Me. 1978).
- 2 Newlon v. Allen, 106 Kan. 526, 188 P. 248 (1920); Ingram Day Lumber Co. v. Robertson, 129 Miss. 365, 92 So. 289 (1922).
- 3 Columbia Ry., Gas & Electric Co. v. State of South Carolina, 261 U.S. 236, 43 S. Ct. 306, 67 L. Ed. 629 (1923).
- 4 Ingram Day Lumber Co. v. Robertson, 129 Miss. 365, 92 So. 289 (1922).
- 5 State v. Central Maine Power Co., 640 A.2d 1067 (Me. 1994).
- 6 Harris v. Emmerling, 224 Ark. 40, 271 S.W.2d 618 (1954).
- 7 Lake Union Drydock Co., Inc. v. State Dept. of Natural Resources, 143 Wash. App. 644, 179 P.3d 844 (Div. 2 2008).

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§ 72. Grants to state or public corporation

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If property is granted to a public corporation as trustee with restrictions imposed by the grant, the legislature may prohibit the corporation from accepting the trust, but, once accepted, the subject of the trust must be applied to the purposes to which it has been dedicated by the grantor.¹ If the purpose of a grant of land is to produce a fund, accumulated by the sale and use of the trust lands, with which the State can support the public institutions designated by the act, and if careful restrictions are imposed to assure that the trust receives the full value of any land transferred from it, the State may not take part of the trust lands for other public activities without actually compensating the trust in money for the full appraised value of any lands so taken.²

A requirement that gifts to the State must be absolute is not violated by expressions of the grantor's desires about what the State will do with the property if the conveyance does not contain a reverter or re-entry clause.³ While a successor of the grantor to the State may seek to enforce a reverter after the State decided to sell the property rather than use it for highway purposes,⁴ a successor of the original grantor may not enforce a clause in the deed from the highway administration to a county to that effect since the successor is not a third party beneficiary of the deed between the State and county.⁵

The usual rules of construction are used to determine if an instrument conveyed to the State a perpetual easement and right of way for highway purposes.⁶

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Footnotes

¹ [Patrick v. Blake](#), 70 S.D. 494, 19 N.W.2d 220 (1945).

² [Lassen v. Arizona ex rel. Arizona Highway Dept.](#), 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967).

- 3 Roten v. State, 8 N.C. App. 643, 175 S.E.2d 384 (1970).
- 4 Commonwealth Transp. Com'r v. Windsor Industries, Inc., 272 Va. 64, 630 S.E.2d 514 (2006) (also holding
that initiation of a declaratory judgment action was a sufficient demand to reconvey).
- 5 Lovell Land, Inc. v. State Highway Admin., 408 Md. 242, 969 A.2d 284 (2009).
- 6 Dias v. State, Dept. of Transp. and Public Facilities, 240 P.3d 272 (Alaska 2010) (instrument not ambiguous,
and even if it were, extrinsic evidence supported so finding).

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§ 73. Generally

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West's Key Number Digest, [States](#) 90

Forms

[Am. Jur. Legal Forms 2d § 239:20](#) (Contract—For purchase of goods and merchandise by state)

Unless there is some constitutional provision to the contrary, the State may make contracts.¹ A state's power to enter into contracts that advance its proprietary interest is absolute and unqualified except as limited by the state or federal constitutions.²

The reservation of power to the states by the 10th Amendment protected their right to make contracts and give consents if those actions would not contravene the provisions of the U.S. Constitution.³ The contracts clauses of a state and the U.S. constitutions generally apply to contracts to which the state is a party, and a state is bound by the same rules as those it applies to its citizens.⁴

A state government may not contract away any essential attribute of its sovereignty.⁵ A court lacks equitable power to affirm state contracts that contravene the mandatory language of a statute.⁶

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Footnotes

1

[State ex rel. Creighton University v. Smith](#), 217 Neb. 682, 353 N.W.2d 267, 19 Ed. Law Rep. 405 (1984).

A state constitution does not prohibit the State from doing business or contracting with private institutions in fulfilling a government duty and furthering a public purpose. *Yant v. City of Grand Island*, 279 Neb. 935, 784 N.W.2d 101 (2010).

As to government contracts, generally, see *Am. Jur. 2d, Public Works and Contracts §§ 1 et seq.*

2 *Butler v. Hatfield*, 277 Minn. 314, 152 N.W.2d 484 (1967).

3 A clause in a state constitution governs intergovernmental contracts. *Greene County School Dist. v. Greene*
4 *County*, 278 Ga. 849, 607 S.E.2d 881, 195 Ed. Law Rep. 349 (2005).

5 U.S. v. Bekins, 304 U.S. 27, 58 S. Ct. 811, 82 L. Ed. 1137 (1938).

6 *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408 (2006).

U.S. v. Winstar Corp., 518 U.S. 839, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996); *Wheat Ridge Urban Renewal*
Authority v. Cornerstone Group XII, L.L.C., 176 P.3d 737 (Colo. 2007) (core government powers); *Com. v.*
Philip Morris Inc., 448 Mass. 836, 864 N.E.2d 505 (2007) (this rule is backdrop of construction of contract).

Blaine Equipment Co., Inc. v. State, 122 Nev. 860, 138 P.3d 820 (2006).

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§ 74. Parties with whom contracts may be made

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West's Key Number Digest, [States](#)  90, 102, 104

In general, a state is free to contract with whom it pleases.¹ A State may lay aside its sovereignty and, like a private individual or corporation, contract either with other public bodies or with private persons, and be bound as a private person would be bound under a similar contract.²

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Footnotes

- 1 Linton by Arnold v. Commissioner of Health and Environment, State of Tenn., 65 F.3d 508, 1995 FED App. 0278P (6th Cir. 1995).
- 2 Houston & T.C.R. Co. v. State of Tex., 177 U.S. 66, 20 S. Ct. 545, 44 L. Ed. 673 (1900); Chun King Sales, Inc. v. St. Louis County, 256 Minn. 375, 98 N.W.2d 194 (1959); Com. v. Udzienicz, 353 Pa. 543, 46 A.2d 231 (1946).

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§ 75. Agencies or persons who may make contracts for state

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West's Key Number Digest

West's Key Number Digest, [States](#) 91 to 94, 102

A State, in making a contract, must act through some agency, including the legislature.¹ The legislature may delegate the authority to contract to officers, commissions, boards, or committees in the absence of a constitutional restriction to the contrary.²

Generally, only persons authorized by the state constitution or a statute may make a contract binding on a state, and only persons having actual authority may bind a state in contract.³ Such officers must act within the scope of their authority; a state is not bound by the unauthorized contracts of its officers.⁴ One who makes a contract with a state agency is bound to take notice of the limitations of its powers to contract.⁵ However, a contract made by a state officer in excess of his or her authority may be ratified by the legislature.⁶

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Footnotes

¹ [Naftalin v. King](#), 252 Minn. 381, 90 N.W.2d 185 (1958).

As to a legislature's general power to contract, see § 40.

² [Consolidated Indemnity & Insurance Co. v. Texas Co.](#), 224 Ala. 349, 140 So. 566 (1932); [State v. Toole](#), 26 Mont. 22, 66 P. 496 (1901); [Myers v. Nebraska Inv. Council](#), 272 Neb. 669, 724 N.W.2d 776 (2006) (delegation of power to contract for investment management services permissible); [Russ v. Commonwealth](#), 210 Pa. 544, 60 A. 169 (1905); [Butler v. Darst](#), 68 W. Va. 493, 70 S.E. 119 (1911).

³ [State ex rel. Dept. of Criminal Justice v. VitaPro Foods, Inc.](#), 8 S.W.3d 316 (Tex. 1999). Director of a department of health had specific statutory authority to contract for family planning services. [Shipley v. Cates](#), 200 S.W.3d 529 (Mo. 2006). As to actual authority, generally, see [Am. Jur. 2d, Agency §§ 70 et seq.](#)

- 4 Lingo-Leeper Lumber Co. v. Carter, 1932 OK 735, 161 Okla. 5, 17 P.2d 365 (1932).
5 Orion Portfolio Services 2 LLC v. County of Clark ex rel. University Medical Center of Southern Nevada,
245 P.3d 527, 126 Nev. Adv. Op. No. 39 (Nev. 2010).
6 Butler v. Hatfield, 277 Minn. 314, 152 N.W.2d 484 (1967); Shipley v. Cates, 200 S.W.3d 529 (Mo. 2006)
(recognizing rule).

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§ 76. Procedural and formal requirements

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A board or officer must follow the procedure specified in the law under which the contract is authorized.¹

State contracts need not be in writing to be binding unless there is a statutory requirement.²

CUMULATIVE SUPPLEMENT

Cases:

A legislative enactment is presumed, not to create contractual or vested rights, but merely declares a policy to be pursued until the legislature shall ordain otherwise; thus, courts employ a very strong presumption that legislative enactments do not create contractual rights. [Madison Teachers, Inc. v. Walker](#), 2014 WI 99, 851 N.W.2d 337 (Wis. 2014).

[END OF SUPPLEMENT]

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Footnotes

¹ [R.G. Wilmott Coal Co. v. State Purchasing Com'n](#), 246 Ky. 115, 54 S.W.2d 634, 86 A.L.R. 127 (1932). As to procedures required when public works contracts must be let by competitive bidding, generally, see [Am. Jur. 2d, Public Works and Contracts §§ 25 et seq.](#)

2

[Robert W. Anderson Housewrecking and Excavating, Inc. v. Board of Trustees, School Dist. No. 25, Fremont County, Wyo., 681 P.2d 1326, 17 Ed. Law Rep. 1232 \(Wyo. 1984\).](#)

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§ 77. Necessity and effect of appropriation

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Valid agreements may be made for a state before there is an appropriation to pay what is due under them if there is express authority for making them.¹ The fact that a contract is contingent on a legislative appropriation does not invalidate the arrangement.²

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Footnotes

1 [State ex rel. Armontrout v. Smith, 353 Mo. 486, 182 S.W.2d 571 \(1944\).](#)

2 [Butler v. Hatfield, 277 Minn. 314, 152 N.W.2d 484 \(1967\).](#)

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§ 78. Construction, application, and effect

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A state should be held to the same principles of construction and application of contract provisions as govern private persons and corporations when contracting with each other.¹ Thus, for example, ambiguities in a contract drafted by the State are to be resolved against the state.² Furthermore, a state agency does not have more power to institute unilateral material changes in an existing contract than does a private entity.³

Once the executive branch has negotiated and the legislature has accepted and funded an agreement, the State and all its agencies are bound by that agreement under the principles of contract law.⁴ Settlement agreements resolving litigation between a State and other parties are enforceable contracts.⁵

A contract that affects a public interest is interpreted so as to favor the state.⁶ Any waiver of sovereign power must be in terms too clear to be doubtful.⁷ Unlike with regard to private contracts, courts do not infer a contractual intent that a State pay by a reasonable time when the State made the contract in discharge of its government duties.⁸

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Footnotes

¹ *Carter v. State*, 980 So. 2d 473 (Fla. 2008) (State not bound where condition not fulfilled); *State ex rel. Stovall v. Reliance Ins. Co.*, 278 Kan. 777, 107 P.3d 1219 (2005) (third party beneficiary); *Myers v. Nebraska Inv. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006) (unconscionability); *Lingo-Leeper Lumber Co. v. Carter*, 1932 OK 735, 161 Okla. 5, 17 P.2d 365 (1932); *State v. Evans*, 47 Tenn. App. 1, 334 S.W.2d 337 (1959); *Campbell Bldg. Co. v. State Road Commission*, 95 Utah 242, 70 P.2d 857 (1937); *Horse Creek Conservation*

Dist. v. State ex rel. Wyoming Attorney General, 2009 WY 143, 221 P.3d 306 (Wyo. 2009) (interpret in a manner to comply with the law).

2 Delzer Const. Co. v. South Dakota State Bd. of Transp., 275 N.W.2d 352 (S.D. 1979).

3 State ex rel. Oklahoma Capitol Imp. Authority v. Walter Nashert & Sons, Inc., 1974 OK 5, 518 P.2d 1267 (Okla. 1974).

4 Chiles v. United Faculty of Florida, 615 So. 2d 671 (Fla. 1993), opinion clarified, 143 L.R.R.M. (BNA) 2806, 1993 WL 13650259 (Fla. 1993).

5 Rathke v. Corrections Corp. of America, Inc., 153 P.3d 303 (Alaska 2007) (prison litigation); State ex rel. Humphrey v. Philip Morris USA, Inc., 713 N.W.2d 350 (Minn. 2006) (tobacco settlement).

6 Continental Illinois Nat. Bank and Trust Co. of Chicago v. State of Wash., 696 F.2d 692 (9th Cir. 1983).

7 State ex rel. Humphrey v. Philip Morris USA, Inc., 713 N.W.2d 350 (Minn. 2006).

8 H.D. Goodall Hosp. v. Department of Health and Human Services, 2008 ME 105, 951 A.2d 828 (Me. 2008).

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I. Contracts

§ 79. Construction, application, and effect—Incorporation of existing law

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West's Key Number Digest

West's Key Number Digest, [States](#)  104

A person who contracts with a state is chargeable with knowledge of the statutes that regulate its contracting powers and is bound by them,¹ and those conditions need not be expressly stated in the contract.² The existing law of the state is a part of every contract made with the state.³

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Footnotes

1 [Parsa v. State](#), 64 N.Y.2d 143, 485 N.Y.S.2d 27, 474 N.E.2d 235, 23 Ed. Law Rep. 212 (1984).

2 [Young Partners, LLC v. Board of Educ.](#), Unified School Dist. No. 214, Grant County, 284 Kan. 397, 160 P.3d 830, 220 Ed. Law Rep. 912 (2007).

3 [Ehco Ranch, Inc. v. State ex rel. Evans](#), 107 Idaho 808, 693 P.2d 454, 22 Ed. Law Rep. 543 (1984).

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1. In General

§ 80. Power of legislature

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West's Key Number Digest

West's Key Number Digest, [States](#) 121

Except for specific constitutional prohibitions, a state legislature has the right and the responsibility to declare the state's fiscal policy,¹ it is the legislature's function to determine how public funds should be spent and to evaluate the economic conditions facing other government units.² In this regard, the adoption of a budget is a legislative matter, and the duty to oversee the budget process requires an overview of all budgetary expenditures and the power to adjust non-mandatory funding to balance the budget.³ A balanced budget provision may empower a legislature to use adequate devices to balance the budget if revenues become inadequate, including suspending and modifying existing statutes that have financial implications.⁴

The U.S. Constitution provides that states may not coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts.⁵

CUMULATIVE SUPPLEMENT

Cases:

The Legislature's estimate of revenues used to determine whether the state budget complies with the balanced budget provision of the state constitution may include revenue sources not yet authorized in existing law or in enrolled legislation. [Cal. Const. art. 4, § 12\(g\). Steinberg v. Chiang](#), 223 Cal. App. 4th 338, 167 Cal. Rptr. 3d 249 (3d Dist. 2014).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Calvey v. Daxon, 2000 OK 17, 997 P.2d 164 \(Okla. 2000\)](#).
Budget authority is subject to state constitutional limitations. [Ehrlich v. Perez, 394 Md. 691, 908 A.2d 1220 \(2006\)](#).
- 2 [Anderson v. City of Milwaukee, 208 Wis. 2d 18, 559 N.W.2d 563 \(1997\)](#).
As to appropriations, generally, see [Am. Jur. 2d, Public Funds §§ 25 et seq.](#)
As to the issuance of state bonds and securities, see [Am. Jur. 2d, Public Securities and Obligations §§ 1 et seq.](#)
- 3 [Jones v. Board of Trustees of Kentucky Retirement Systems, 910 S.W.2d 710 \(Ky. 1995\)](#).
- 4 [Beshear v. Haydon Bridge Co., Inc., 304 S.W.3d 682 \(Ky. 2010\)](#), as corrected, (Mar. 17, 2010).
- 5 [U.S. Const. Art. I, § 10, cl. 1](#).

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1. In General

§ 81. Governor's authority

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A state constitution may give the governor the power to effect necessary economies in state expenditures.¹

A governor does not violate the separation of powers doctrine by applying a statute allowing the governor to reduce executive branch expenditures to maintain a balanced state budget since the governor chose to give priority to a legislative mandate to ensure a balanced budget.²

A statute allowing the governor to reduce allotments of legislative appropriations to avoid deficit spending only applies in a deficit situation and does not give the governor an alternative means to balance the budget that bypasses the ordinary budgetary process.³

A governor does not have the power to continue the previous year's budget as a guide for additional appropriations when the legislature fails to pass a budget.⁴

CUMULATIVE SUPPLEMENT

Cases:

So long as the General Assembly keeps the budget submitted by the Governor balanced, the Pennsylvania Constitution allows the General Assembly to deviate as much as it wishes from the Governor's proposals. [Pa. Const. art. 8, § 13. Brouillette v. Wolf](#), 213 A.3d 341 (Pa. Commw. Ct. 2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 [County of Cabarrus v. Tolson, 169 N.C. App. 636, 610 S.E.2d 443 \(2005\)](#) (defining "expenditures").
- 2 [New Hampshire Health Care Ass'n v. Governor, 161 N.H. 378, 13 A.3d 145 \(2011\)](#).
- 3 [Brayton v. Pawlenty, 781 N.W.2d 357 \(Minn. 2010\)](#).
- 4 [Fletcher v. Com., 163 S.W.3d 852 \(Ky. 2005\)](#).

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1. In General

§ 82. Presentation and auditing of claims

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, States 169, 177, 181

A state constitution¹ or legislature may require as a condition precedent to the payment of a claim that it be presented to a state board, officer, or other agency for allowance or auditing.² However, once a claim against a state has been approved and has become law by the exercise of legislative and executive powers, it is a debt of the state, in the absence of a successful judicial attack, and the governor is mandated, under provisions of the state constitution, to include the claim within the budget bill.³

A state auditor has the authority and duty to investigate or require further proof of a claim where ample reason exists to question its legality and is not bound by determinations of other state officers where there are valid grounds to question the claims.⁴

CUMULATIVE SUPPLEMENT

Cases:

The Comptroller has the constitutional authority to review the billing records of private companies that provide health care to beneficiaries of a state insurance program. *N.Y. Const. art. 5, § 1. Plastic Surgery Group, P.C. v. Comptroller of State*, 34 N.Y.3d 507, 121 N.Y.S.3d 723, 144 N.E.3d 332 (2019).

[END OF SUPPLEMENT]

Footnotes

- 1 [Idaho Water Resource Bd. v. Kramer](#), 97 Idaho 535, 548 P.2d 35 (1976) (state constitution provision creating a board of examiners).
- 2 [State v. Brannon](#), 86 Mont. 200, 283 P. 202, 67 A.L.R. 1020 (1929); [State v. Kelly](#), 27 N.M. 412, 202 P. 524, 21 A.L.R. 156 (1921); [MacDougall v. Board of Land Com'rs of Wyoming](#), 48 Wyo. 493, 49 P.2d 663 (1935).
- 3 [Russell Transfer, Inc. v. Moore](#), 158 W. Va. 534, 212 S.E.2d 433 (1975).
- 4 [State ex rel. Krabach v. Ferguson](#), 46 Ohio St. 2d 168, 75 Ohio Op. 2d 207, 346 N.E.2d 681 (1976).

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2. Restrictions on Borrowing

§ 83. Generally

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West's Key Number Digest

West's Key Number Digest, [States](#) 115 to 118, 120

Some state constitutions contain provisions limiting the amount of debt that the State may incur, such as provisions that the State shall not create any debt or liability, except for certain purposes, in excess of a prescribed amount.¹ Other state constitutional provisions specify that, with certain exceptions, the State may not incur a debt in excess of a specified amount without a vote of the people.²

The term "debt," under such a constitutional provision, refers only to legally enforceable obligations against the State's general funds or taxing power.³ Generally, the contractual obligations that are subject to state constitutional debt limitation provisions are those that obligate a state to impose taxes on an ongoing basis to meet the obligations of the debt.⁴ A debt that is incurred by an independent political subdivision is not a debt of the state.⁵ A contingent obligation is not a "debt" or "liability" within the meaning of a constitutional debt limitation⁶ and becomes a debt only after the contingency occurs.⁷

A State that diverts money from a use intended when the fund was created, to some other purpose, may have a duty to replenish the fund, but a debt is not created.⁸ However if a state agency performing a major government function obligates the funds to be appropriated to it in future years, a state debt is created where the State cannot abandon or discontinue the function and still continue to operate as a government.⁹ Also, the encumbering of state property as security for a loan is a debt of the State within such a constitutional provision even if the State is not otherwise directly liable to make payment.¹⁰

Footnotes

- 1 Am. Jur. 2d, Public Securities and Obligations § 42.
- 2 City of Camden v. Byrne, 82 N.J. 133, 411 A.2d 462 (1980); *Witzenburger v. State ex rel. Wyoming Community Development Authority*, 575 P.2d 1100 (Wyo. 1978).
- 3 Taxpayers for Improving Public Safety v. Schwarzenegger, 172 Cal. App. 4th 749, 91 Cal. Rptr. 3d 370 (3d Dist. 2009); *Idaho Water Resource Bd. v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976).
Only debt that is legally enforceable against the State is subject to a debt limitation clause. *Lonegan v. State*, 176 N.J. 2, 819 A.2d 395, 175 Ed. Law Rep. 285 (2003).
- 4 Baker v. Matheson, 607 P.2d 233 (Utah 1979).
- 5 Dykes v. Northern Virginia Transp. Dist. Com'n, 242 Va. 357, 411 S.E.2d 1 (1991).
- 6 In re Quantification Settlement Agreement Cases, 201 Cal. App. 4th 758, 134 Cal. Rptr. 3d 274 (3d Dist. 2011), review denied, (Mar. 14, 2012).
- 7 Taxpayers for Improving Public Safety v. Schwarzenegger, 172 Cal. App. 4th 749, 91 Cal. Rptr. 3d 370 (3d Dist. 2009).
- 8 *Eastern & Western Lumber Co. v. Patterson*, 124 Or. 146, 264 P. 441, 60 A.L.R. 528 (1928), aff'd, 278 U.S. 581, 49 S. Ct. 184, 73 L. Ed. 518 (1929).
Transfers of funds designated for specific purposes to the general fund did not create any debt in violation of a constitutional provision preventing the State from contracting any debt by loan in any form where none of the statutes authorizing the transfers pledged future revenues or revenues from taxes that were otherwise available for general purposes. *Barber v. Ritter*, 170 P.3d 763 (Colo. App. 2007), judgment aff'd in part, rev'd in part on other grounds, 196 P.3d 238 (Colo. 2008).
- 9 *Curlin v. Wetherby*, 275 S.W.2d 934 (Ky. 1955).
- 10 *State ex rel. Thomson v. Giessel*, 267 Wis. 331, 65 N.W.2d 529 (1954).

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§ 84. Obligation of existing or anticipated funds

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#) 115, 116

An obligation for which an appropriation is made at the time of its creation from existing funds, or reasonably anticipated funds subject to appropriation, is not within a constitutional debt limit.¹ Contracts made on the strength of anticipated taxes are thus treated as cash transactions for purposes of a debt limit.²

It is essential to the application of this rule that the taxes appropriated were levied before the appropriation.³ Also, an obligation payable out of revenues to be collected after the termination of the fiscal year in which the obligation is incurred is within a constitutional debt limitation.⁴

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Footnotes

¹ [Taxpayers for Improving Public Safety v. Schwarzenegger](#), 172 Cal. App. 4th 749, 91 Cal. Rptr. 3d 370 (3d Dist. 2009) (further noting that the limit does not apply so long as long-term debt has not been created in a given year to pay for that year's current expenses); [State v. State Board of Examiners](#), 59 Mont. 557, 197 P. 988 (1921); [Lonegan v. State](#), 176 N.J. 2, 819 A.2d 395, 175 Ed. Law Rep. 285 (2003); [Local Government Assistance Corp. v. Sales Tax Asset Receivable Corp.](#), 2 N.Y.3d 524, 780 N.Y.S.2d 507, 813 N.E.2d 587 (2004) (statute providing for multiyear payments pursuant to annual legislative appropriations); [In re Application of Oklahoma Dept. of Transp.](#), 2003 OK 105, 82 P.3d 1000 (Okla. 2003) (notes in anticipation of federal highway aid); [U. S. Rubber Products v. Town of Batesburg](#), 183 S.C. 49, 190 S.E. 120, 110 A.L.R. 144 (1937).

- 2 Riley v. Johnson, 219 Cal. 513, 27 P.2d 760, 92 A.L.R. 1292 (1933); Rowley v. Clarke, 162 Iowa 732, 144
N.W. 908 (1913).
3 Anderson v. International School Dist. No. 5, Portal Tp., Burke County, 32 N.D. 413, 156 N.W. 54 (1915).
4 Stevenson v. Blake, 88 S.W.2d 773 (Tex. Civ. App. San Antonio 1935), judgment aff'd, 131 Tex. 103, 113
S.W.2d 525 (Comm'n App. 1938).

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§ 85. Obligations payable from special funds

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#) 115, 116, 127

An obligation that is payable from a special fund created by the imposition of fees, penalties, or excise taxes, and for the payment of which the general credit of the state is not pledged, is not a debt within the meaning of constitutional debt limits.¹ A state debt is not created if bonds issued to finance a particular project are to be paid solely from the revenue of that project and are not a charge on the state's general credit or its taxing power.²

To qualify for the special fund doctrine, the sources of payment must be specified to make it clear that no part is to be paid from general taxation.³ Thus, general revenues may not be designated to liquidate revenue bonds, since a "debt" would be created that would burden the existing general revenue fund, in violation of a constitutional provision prohibiting the levying of a tax to satisfy debt undertaken by the state.⁴

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Footnotes

¹ *Turnpike Authority of Ky. v. Wall*, 336 S.W.2d 551 (Ky. 1960); *Morris v. Board of Regents of University of Nevada*, 97 Nev. 112, 625 P.2d 562 (1981); *Lonegan v. State*, 176 N.J. 2, 819 A.2d 395, 175 Ed. Law Rep. 285 (2003); *State ex rel. Capitol Addition Bldg. Commission v. Connelly*, 39 N.M. 312, 46 P.2d 1097, 100 A.L.R. 878 (1935) (court costs); *In re Oklahoma Development Finance Authority*, 2004 OK 26, 89 P.3d 1075 (Okla. 2004), as corrected, (May 3, 2004) (bonds financed by foregone incentive payments); *State ex rel. Bd. of Governors of W. Va. University v. O'Brien*, 142 W. Va. 88, 94 S.E.2d 446 (1956); *Witzenburger v. State ex rel. Wyoming Community Development Authority*, 575 P.2d 1100 (Wyo. 1978).

- 2 *Watrous v. Golden Chamber of Commerce*, 121 Colo. 521, 218 P.2d 498 (1950); *Frost v. State*, 172 N.W.2d 575 (Iowa 1969); *State ex rel. Washington State Finance Committee v. Martin*, 62 Wash. 2d 645, 384 P.2d 833 (1963); *State ex rel. Bd. of Governors of W. Va. University v. O'Brien*, 142 W. Va. 88, 94 S.E.2d 446 (1956) (to construct college or university buildings, payable only from building revenues and student fees). As to revenue bonds, generally, see *Am. Jur. 2d, Public Securities and Obligations* § 313.
- 3 *State Office Bldg. Commission v. Trujillo*, 46 N.M. 29, 120 P.2d 434 (1941).
- 4 *State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee*, 213 W. Va. 255, 580 S.E.2d 869 (2003) (but holding that use of a school building debt service fund generated by lottery proceeds to repay a school building authority's revenue bonds would not violate that provision).

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§ 86. Obligations payable from taxes other than property tax

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West's Key Number Digest

West's Key Number Digest, States 115, 116, 134

A state debt is not created within the meaning of constitutional provisions if the obligations are to be met from the proceeds of a tax levied for that particular purpose¹ or if they are secured by the pledge of a fund reasonably sufficient to pay them without resorting to the levy of a property tax.²

The views have been followed that constitutional debt limitations do not apply to obligations that are to be met through excise taxes³ and that it is not objectionable that the source of revenue does not have a relation to the object for which the proceeds of the bonds are to be spent.⁴ However, it has also been held that any obligation that must be paid from any tax levied generally is a debt of the state, whether the tax is ad valorem or excise.⁵

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Footnotes

1 [Naftalin v. King](#), 252 Minn. 381, 90 N.W.2d 185 (1958).

2 [Mims v. McNair](#), 252 S.C. 64, 165 S.E.2d 355 (1969).

3 [State ex rel. Capitol Addition Bldg. Commission v. Connelly](#), 39 N.M. 312, 46 P.2d 1097, 100 A.L.R. 878 (1935).

4 [State ex rel. Roddey v. Byrnes](#), 219 S.C. 485, 66 S.E.2d 33 (1951) (sales tax covering school bonds).

5 [State ex rel. Washington State Finance Committee v. Martin](#), 62 Wash. 2d 645, 384 P.2d 833 (1963).

See also [Turnpike Authority of Ky. v. Wall](#), 336 S.W.2d 551 (Ky. 1960), doubting that the fact that an excise tax is the source of payment necessarily keeps an obligation from being a debt.

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§ 87. Lease or agreement with option to purchase

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [States](#) 115, 117

A constitutional debt limitation provision is not violated if a lease or other agreement between the state and a private party containing an option to purchase is made in good faith and does not create an immediate debt for the aggregate installments but confines liability to each installment as it falls due, and each year's payment is for the consideration actually furnished that year.¹ However, the arrangement comes within a debt limit if the instrument creates a complete liability on its execution or if its designation as a "lease" is a subterfuge and it is actually a conditional sales contract in which the "rentals" are installment payments on the purchase price.²

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Footnotes

1 [Dean v. Kuchel](#), 35 Cal. 2d 444, 218 P.2d 521 (1950); [Bulman v. McCrane](#), 64 N.J. 105, 312 A.2d 857 (1973) (25-year lease on a building, with title reverting to the state at the end of the term).

2 [Dean v. Kuchel](#), 35 Cal. 2d 444, 218 P.2d 521 (1950).

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§ 88. Refinancing debt

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, States 115, 118

Redemption of a previous liability may be an exception to a constitutional ban on a state incurring debt.¹

An issuance of bonds by a state for the purpose of refunding its valid outstanding debt does not increase its aggregate indebtedness but merely changes the form of an existing debt.² This assumes that the original obligations were validly issued; if an outstanding obligation was in excess of the constitutional or statutory obligation, then the refunding obligations are invalid.³ Similarly, legislation allowing the state's entry into swap agreements and related options, in connection with refunding of outstanding bonds, would not create a "debt" of the state in violation of the state constitution.⁴

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Footnotes

- 1 *Perdue v. Wise*, 216 W. Va. 318, 607 S.E.2d 424 (2004) (but holding that the issuance of general revenue bonds to fund pension liability did not come within this exception where the retirement funds were currently actuarially sound).
- 2 *Allison v. City of Phoenix*, 44 Ariz. 66, 33 P.2d 927, 93 A.L.R. 354 (1934); *Veatch v. City of Moscow*, 18 Idaho 313, 109 P. 722 (1910); *National Life Ins. Co. of Montpelier, Vt., v. Mead*, 13 S.D. 37, 82 N.W. 78 (1900), aff'd, 13 S.D. 342, 83 N.W. 335 (1900).
- 3 *In re Town of Afton*, 1914 OK 537, 43 Okla. 720, 144 P. 184 (1914).
- 4 *Opinion of the Justices*, 892 So. 2d 375 (Ala. 2004).

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K. Actions and Liability

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K. Actions and Liability

1. Actions Brought by States

a. Overview

§ 89. Generally

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West's Key Number Digest, States 190, 192

A State, as a political corporation, has the right, independent of any statutory provision, to institute a suit in any of its courts¹ or federal courts,² whether doing so is required by its pecuniary interests³ or by the general public welfare.⁴ It possesses this right, both in its sovereign capacity and by virtue of its corporate rights.⁵

A State may adopt any remedy or employ any legal measure that a private suitor may use,⁶ such as tort actions for damage to its property,⁷ suits for money had and received to recover money paid by mistake,⁸ and injunction proceedings.⁹ While a State is not ordinarily entitled to an injunction restraining acts committed in another state, either by that state or by its citizens, it may resort to an injunction if such acts injuriously affect its interests and resources.¹⁰

If a State enters a court as a litigant, it places itself on the same basis as any other litigant,¹¹ subjecting itself to the inherent authority of the court to control actions before it.¹²

An individual citizen may be made a party to a suit in the Supreme Court of the United States between states; in such case, the citizen should have a suitable opportunity to show the nature of his or her interest and why the relief asked against him or her individually should not be granted.¹³

Footnotes

- 1 State ex rel. Burgum v. Hooker, 87 N.W.2d 337 (N.D. 1957).
- 2 State of North Dakota ex rel. Lemke v. Chicago & N.W. Ry. Co., 257 U.S. 485, 42 S. Ct. 170, 66 L. Ed. 329 (1922).
- 3 State v. F. W. Fitch Co., 236 Iowa 208, 17 N.W.2d 380 (1945).
- 4 State ex rel. Burgum v. Hooker, 87 N.W.2d 337 (N.D. 1957).
- 5 State ex rel. Burgum v. Hooker, 87 N.W.2d 337 (N.D. 1957).
- 6 State of Ga. v. Tennessee Copper Co., 206 U.S. 230, 27 S. Ct. 618, 51 L. Ed. 1038 (1907); Humphreys v. State, 70 Ohio St. 67, 70 N.E. 957 (1904); State v. Huston, 1910 OK 259, 27 Okla. 606, 113 P. 190 (1910).
- 7 State v. F. W. Fitch Co., 236 Iowa 208, 17 N.W.2d 380 (1945).
- 8 State v. Young, 134 Iowa 505, 110 N.W. 292 (1907).
- 9 State of Ga. v. Tennessee Copper Co., 206 U.S. 230, 27 S. Ct. 618, 51 L. Ed. 1038 (1907); State of Missouri v. State of Illinois, 180 U.S. 208, 21 S. Ct. 331, 45 L. Ed. 497 (1901); People ex rel. Miller v. Tool, 35 Colo. 225, 86 P. 231 (1905); State ex rel. Burgum v. Hooker, 87 N.W.2d 337 (N.D. 1957); St. Louis Southwestern Ry. Co. of Tex. v. State, 113 Tex. 570, 261 S.W. 996, 33 A.L.R. 367 (1924).
- 10 Commonwealth of Pennsylvania v. State of West Virginia, 262 U.S. 553, 43 S. Ct. 658, 67 L. Ed. 1117, 1 Ohio L. Abs. 627, 32 A.L.R. 300 (1923), aff'd, 263 U.S. 350, 44 S. Ct. 123, 67 L. Ed. 1144, 2 Ohio L. Abs. 51 (1923); State of Ga. v. Tennessee Copper Co., 206 U.S. 230, 27 S. Ct. 618, 51 L. Ed. 1038 (1907).
- 11 Federal Sign v. Texas Southern University, 951 S.W.2d 401, 121 Ed. Law Rep. 394 (Tex. 1997).
- 12 Noble County v. Rogers, 745 N.E.2d 194 (Ind. 2001).
- 13 As to a state's participation in litigation as waiving the defense of sovereign immunity, see § 128.
- Commonwealth of Kentucky v. State of Indiana, 281 U.S. 163, 50 S. Ct. 275, 74 L. Ed. 784 (1930).

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1. Actions Brought by States

a. Overview

§ 90. Application of general rules of procedure and evidence

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West's Key Number Digest

West's Key Number Digest, [States](#) 190

In the absence of any statute to the contrary, a State, when bringing suit, is subject to the general rules of practice and pleading that apply in cases between private litigants.¹ The general rule that the state is not bound by a statute unless it is expressly named² does not apply to general rules of procedure in civil actions.³

As a general rule, a State seeking equitable relief must, like private individuals, bring itself within the applicable rules of equity.⁴

The general rules of evidence apply in an action by a State in its own courts, the courts of sister states, or federal courts.⁵

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Footnotes

1 [State ex rel. Com'r of Land Office v. Mobley](#), 1949 OK 6, 208 Okla. 342, 255 P.2d 945 (1949).

2 § 6.

3 [State ex rel. Hamilton v. Standard Oil Co. of California](#), 190 Wash. 496, 68 P.2d 1031 (1937).

4 [People ex rel. Brown v. Barenfeld](#), 203 Cal. App. 2d 166, 21 Cal. Rptr. 501 (2d Dist. 1962); [State ex rel. Com'r of Land Office v. Sparks](#), 1953 OK 39, 208 Okla. 150, 253 P.2d 1070 (1953).

5 [Arkansas State Highway Commission v. Partain](#), 193 Ark. 803, 103 S.W.2d 53 (1937).

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§ 91. Defenses

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West's Key Number Digest

West's Key Number Digest, [States](#) 198

Generally speaking, a State that voluntarily places itself in the position of a litigant, whether in its own courts or in those of another state, is subject to proper defenses.¹ Thus, a State, by bringing an equitable claim, generally opens the door to any defense or cross complaint germane to the matter in controversy.²

Caution:

However, a setoff or counterclaim founded on an independent claim normally may not be maintained against a state unless authorized by statute.³ Also, a statute on where a state officer may be sued controls over procedural rules on counterclaims.⁴

There is authority that a State that sues to recover for damage to its property waives its sovereign immunity, and the defense that the state's own employees were contributorily negligent may be asserted.⁵ However, there is some authority to the contrary.⁶

Ordinarily, the statute of limitations does not apply if the State sues in its sovereign capacity.⁷ However, because this immunity is a vestige of the concept of sovereign immunity and is designed to protect the enforcement of public rights in the conduct of government affairs, it should not be extended to other types of statutes that do not totally bar claims.⁸ Also, the State, as a party to a contract, is bound by a contract provision that limits the time within which suit may be brought.⁹

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Footnotes

- 1 [State of Missouri v. Homesteaders Life Ass'n](#), 16 F. Supp. 69 (W.D. Mo. 1936); [Arkansas State Highway Commission v. Partain](#), 193 Ark. 803, 103 S.W.2d 53 (1937); [People ex rel. Brown v. Barenfeld](#), 203 Cal. App. 2d 166, 21 Cal. Rptr. 501 (2d Dist. 1962); [Anderson, Clayton & Co. v. State ex rel. Allred](#), 122 Tex. 530, 62 S.W.2d 107 (Comm'n App. 1933).
- 2 [People ex rel. Brown v. Barenfeld](#), 203 Cal. App. 2d 166, 21 Cal. Rptr. 501 (2d Dist. 1962).
- 3 [Am. Jur. 2d, Counterclaim, Recoupment, and Setoff](#) § 63.
- 4 [Proctor v. Kardassilaris](#), 115 Ohio St. 3d 71, 2007-Ohio-4838, 873 N.E.2d 872 (2007).
- 5 [Department of Public Safety v. Parker](#), 161 So. 2d 886 (Fla. 1st DCA 1964); [Department of Highways v. Fogelman](#), 210 La. 375, 27 So. 2d 155 (1946); [State By and Through Dept. of Finance and Administration v. Shinkle](#), 231 Or. 528, 373 P.2d 674 (1962).
- 6 [Gruschow v. New Jersey State Highway Dept.](#), 56 N.J. Super. 146, 152 A.2d 150 (App. Div. 1959).
- 7 [Am. Jur. 2d, Limitation of Actions](#) § 70.
- 8 [In re Bird's Estate](#), 410 Ill. 390, 102 N.E.2d 329 (1951).
- 9 [State v. Evans](#), 47 Tenn. App. 1, 334 S.W.2d 337 (1959).

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§ 92. Effect of judgment against state or state agencies in prior suit

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West's Key Number Digest

West's Key Number Digest, [States](#) 190

Because a State, when it invokes the aid of its courts, subjects itself to the ordinary rules of procedure applicable to other litigants,¹ a judgment against the State is res judicata.² Furthermore, in actions brought by various state agencies or their heads in the performance of their government duties, the State, being the real party in interest, is bound by the judgments under the doctrine of estoppel by judgment.³

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Footnotes

¹ [§ 90.](#)

² [Com. ex rel. Dummit v. Jefferson County](#), 300 Ky. 514, 189 S.W.2d 604, 167 A.L.R. 512 (1945).

³ [State ex rel. Wilson v. Preston](#), 173 Ohio St. 203, 19 Ohio Op. 2d 11, 181 N.E.2d 31, 3 A.L.R.3d 663 (1962).

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b. Standing

§ 93. Generally

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West's Key Number Digest

West's Key Number Digest, [States](#) 190, 192

A State may have standing to assert an injury to a sovereign interest, to some proprietary interest, or to its *parens patriae* interest.¹

A State has standing to sue in its sovereign capacity if it has suffered an economic injury.²

CUMULATIVE SUPPLEMENT

Cases:

A state, to vindicate its interest in the continued enforceability of its laws that are challenged as unconstitutional, or to vindicate any other interest, must be able to designate agents to represent it in federal court. [Hollingsworth v. Perry, 133 S. Ct. 2652 \(2013\)](#).

Official proponents of California ballot initiative, who were authorized by the California Supreme Court to appear in court and assert state's interest in validity of initiative, were not "agents" of the state; proponents answered to no one, but decided for themselves, with no review, what arguments to make and how to make them, and proponents did not owe a fiduciary obligation to the people of California. [Restatement \(Third\) of Agency § 1.01. Hollingsworth v. Perry, 133 S. Ct. 2652 \(2013\)](#).

State has Article III standing to challenge federal regulation if it can show direct injury in form of loss of specific tax revenues. [U.S. Const. art. 3, § 2, cl. 1. XY Planning Network, LLC v. United States Securities and Exchange Commission, 963 F.3d 244 \(2d Cir. 2020\)](#).

State of New Mexico had Article III standing to challenge federal government's reprogramming of Department of Defense funds into drug interdiction fund, where reprogrammed funds would be diverted for construction of barrier along United States' southern border with Mexico, possibly causing injury-in-fact to New Mexico's environment and wildlife. [U.S. Const. art. 3, § 2, cl. 1. California v. Trump, 379 F. Supp. 3d 928 \(N.D. Cal. 2019\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 Chiles v. Thornburgh, 865 F.2d 1197, 13 Fed. R. Serv. 3d 1302 (11th Cir. 1989); Com. of Pa., by Shapp v. Kleppe, 533 F.2d 668, 42 A.L.R. Fed. 1 (D.C. Cir. 1976).
As to parens patriae suits, see § 94.
- 2 Chiles v. Thornburgh, 865 F.2d 1197, 13 Fed. R. Serv. 3d 1302 (11th Cir. 1989).

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§ 94. Parens patriae actions

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West's Key Number Digest

West's Key Number Digest, [States](#) 190, 192

A.L.R. Library

[Standing of state, local government, or agency thereof to bring suit under Civil Rights Act of 1871 \(42 U.S.C.A. sec. 1983\)](#),

[106 A.L.R. Fed. 586](#)

[State's standing to sue on behalf of its citizens, 42 A.L.R. Fed. 23](#)

Law Reviews and Other Periodicals

[Bradford, Simplifying State Standing: The Role of Sovereign Interests in Future Climate Litigation, 52 B.C. L. Rev. 1065 \(2011\)](#)

The "parens patriae" doctrine recognizes the principle that a state, when a party to a suit involving a matter of sovereign or quasi-sovereign interest, represents all of its citizens and therefore has standing.¹ This doctrine creates an exception to the normal

rules of standing applied to private citizens in recognition of the special role that a state plays in pursuing its quasi-sovereign interests in the well-being of its population² and creates a presumption that the state adequately represents the public's interests.³ The doctrine merely deals with standing and does not provide a cause of action,⁴ nor does it create a boundless opportunity for governments to seek recovery for alleged wrongs against them or their residents.⁵ The doctrine is also reserved for states of the United States.⁶

A State, suing as parens patriae, may assert the rights of its citizens based on federal laws.⁷ However, a State may not sue as parens patriae against the federal government because it is the United States, and not the state, that represents the people as parens patriae in their relations with the federal government.⁸

Caution:

Relief obtained by a parens patriae plaintiff may bar private litigants from later bringing suit.⁹

CUMULATIVE SUPPLEMENT

Cases:

Parens patriae suits brought by a government to vindicate interests beyond those of any particular victims do not involve certified plaintiff classes and should not be considered representative actions subject to class action rule. [Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A. Addison Automatics, Inc. v. Hartford Cas. Ins. Co., 731 F.3d 740 \(7th Cir. 2013\)](#).

A stateproperly proceeding as parens patriaemay protect its pseudo-sovereign interest in the welfare of its citizens and integrity of its natural resources; one way it may do so is seeking relief for the invasion of its citizens' possessory interests by pollution in an action for trespass. [Rhode Island v. Atlantic Richfield Company, 357 F. Supp. 3d 129 \(D.R.I. 2018\)](#).

Public trust doctrine, from which state's authority as trustee stems, and parens patriae doctrine are both available to states seeking to remedy environmental harm. [State v. Exxon Mobil Corporation, 126 A.3d 266 \(N.H. 2015\)](#).

While "a reputable person" may initiate an abuse and neglect action, it does not mean that the reputable person has any stake in the action or that the action is being pursued on behalf of the reputable person as the party in interest; instead, an abuse and neglect action is prosecuted on behalf of one party, and only one party: the State of West Virginia, in its role as parens patriae. [West's Ann.W.Va.Code, 49–6–1. In re B.C., 755 S.E.2d 664 \(W. Va. 2014\)](#).

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Footnotes

1 State of N.J. v. State of N.Y., 345 U.S. 369, 73 S. Ct. 689, 97 L. Ed. 1081 (1953); Alaska Sport Fishing Ass'n
v. Exxon Corp., 34 F.3d 769 (9th Cir. 1994); Maryland People's Counsel v. F.E.R.C., 760 F.2d 318 (D.C.
Cir. 1985); Brown & Williamson Tobacco Corporation v. Gault, 280 Ga. 420, 627 S.E.2d 549 (2006); State
v. City of Dover, 153 N.H. 181, 891 A.2d 524 (2006).

The parens patriae doctrine allows a State to bring suit to protect its interests in matters of public concern, and the fact that a statute creates a private right of action does not preclude a sovereign's ability to bring a parens patriae claim since, in such actions, the State merely asserts that in addition to harming its citizens individually, the offending party has harmed the overall interests of the State. *State, Dept. of Health and Social Services, Div. of Family and Youth Services v. Native Village of Curyung*, 151 P.3d 388 (Alaska 2006).

As to what constitutes a quasi-sovereign interest, see § 95.

2 Estados Unidos Mexicanos v. DeCoster, 229 F.3d 332 (1st Cir. 2000).

3 Alaska Sport Fishing Ass'n v. Exxon Corp., 34 F.3d 769 (9th Cir. 1994); Committee for Educational Equality v. State, 294 S.W.3d 477, 249 Ed. Law Rep. 926 (Mo. 2009); Douglas County School Dist. 0001 v. Johanns, 269 Neb. 664, 694 N.W.2d 668, 196 Ed. Law Rep. 949 (2005).

4 State v. Hess Corp., 161 N.H. 426, 20 A.3d 212 (2011), as modified on denial of reconsideration, (Mar. 22, 2011).

5 State of Sao Paulo of Federative Republic of Brazil v. American Tobacco Co., 919 A.2d 1116 (Del. 2007).

6 State of Sao Paulo of Federative Republic of Brazil v. American Tobacco Co., 919 A.2d 1116 (Del. 2007) (foreign governments lacked standing).

7 State of Ga. v. Pennsylvania R. Co., 324 U.S. 439, 65 S. Ct. 716, 89 L. Ed. 1051 (1945).

Under the parens patriae doctrine, a State could sue to protect its citizens against pollution of the air over its territory or of the interstate waters in which the State has rights. *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464 (10th Cir. 1993).

8 Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1923); State of Iowa ex rel. Miller v. Block, 771 F.2d 347 (8th Cir. 1985); State ex rel. Sullivan v. Lujan, 969 F.2d 877 (10th Cir. 1992); Maryland People's Counsel v. F.E.R.C., 760 F.2d 318 (D.C. Cir. 1985).

9 Estados Unidos Mexicanos v. DeCoster, 229 F.3d 332 (1st Cir. 2000); Eyak Native Village v. Exxon Corp., 25 F.3d 773 (9th Cir. 1994); Satsky v. Paramount Communications, Inc., 7 F.3d 1464 (10th Cir. 1993).

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§ 95. *Parsons patriae actions—Necessity of interest apart from those of private parties*

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, *States* 190, 192

To maintain a suit as *parsons patriae*, a State must articulate an interest apart from the interests of particular private parties.¹ The State must express a quasi-sovereign interest that falls into one of two general categories: (1) the health and well-being, both physical and economic, of its residents in general, or (2) not being discriminatorily denied its rightful status within the federal system.² A State does not have *parsons patriae* standing to sue on the basis of personal claims assigned to it by individuals, nor is there standing if the primary thrust of the alleged wrong is an injury to a narrowly limited class of individuals and the harm to the state economy as a whole is insignificant by comparison.³ Thus, a State may not simply aggregate the claims of its citizens but must be able to articulate an injury to the well-being of the State as a whole or to a sufficiently large segment of its population.⁴ The indirect effects of the alleged injury must be considered in determining whether the State has alleged injury to a sufficiently substantial segment of its population.⁵

A state's quasi-sovereign interests consist of a set of interests in the well-being of its populace that are sufficiently concrete to create an actual controversy between the state and the defendant.⁶

A state has a sovereign interest in ensuring that it receives an equitable share of an interstate river's water⁷ but does not have an independent quasi-sovereign interest that could support standing to bring a *parsons patriae* action challenging a "program integrity" regulation governing the Legal Services Corporation since the State's only discernible interest is in seeing that its citizens benefited from voluntary federal grants.⁸

CUMULATIVE SUPPLEMENT

Cases:

Retail Service Station Act (RSSA) did not preclude Attorney General's authority to bring parens patriae suit that sought injunctive and declaratory relief for alleged violations of RSSA by oil company and gasoline distributors; even though RSSA limited Mayor's ability to enforce it and did not provide explicit authority for enforcement by Attorney General, Attorney General had independent authority to litigate on behalf of public, RSSA had been interpreted to allow causes of action by franchisees despite lack of explicit authority, and RSSA did not clearly curtail Attorney General's enforcement powers. [D.C. Code §§ 1-301.81\(a\), 36-303.01\(a\)\(6, 11\), 36-302.05, 36-303.06\(a\)\(1-2\). District of Columbia v. ExxonMobil Oil Corporation, 172 A.3d 412 \(D.C. 2017\).](#)

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Footnotes

- 1 Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982); Estados Unidos Mexicanos v. DeCoster, 229 F.3d 332 (1st Cir. 2000); Brown & Williamson Tobacco Corporation v. Gault, 280 Ga. 420, 627 S.E.2d 549 (2006); State v. Hess Corp., 161 N.H. 426, 20 A.3d 212 (2011), as modified on denial of reconsideration, (Mar. 22, 2011); People ex rel. Spitzer v. Grasso, 11 N.Y.3d 64, 862 N.Y.S.2d 828, 893 N.E.2d 105 (2008).
- 2 Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982); Estados Unidos Mexicanos v. DeCoster, 229 F.3d 332 (1st Cir. 2000); Connecticut v. Cahill, 217 F.3d 93 (2d Cir. 2000).
- 3 Com. of Pa., by Shapp v. Kleppe, 533 F.2d 668, 42 A.L.R. Fed. 1 (D.C. Cir. 1976).
- 4 State, Dept. of Health and Social Services, Div. of Family and Youth Services v. Native Village of Curyung, 151 P.3d 388 (Alaska 2006).
- 5 State v. City of Dover, 153 N.H. 181, 891 A.2d 524 (2006).
- 6 Connecticut v. Cahill, 217 F.3d 93 (2d Cir. 2000).
- 7 South Carolina v. North Carolina, 130 S. Ct. 854, 175 L. Ed. 2d 713, 57 A.L.R. Fed. 2d 663 (2010).
- 8 Oregon v. Legal Services Corp., 552 F.3d 965 (9th Cir. 2009).

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2. Liability of and Actions Against States

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§ 96. Liability on contractual obligations

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West's Key Number Digest

West's Key Number Digest, [States](#) 191.1, 191.9(1)

Ordinarily, a State only incurs liability by means of a contractual obligation.¹ A State is liable on contracts made for its benefit as if it were a private person.² Although it may not be sued without its consent,³ a State, when making a contract with an individual, is liable for a breach of its agreement like an individual contractor.⁴ While it may refuse to respond in damages, and leave a claimant without any remedy, as it may refuse to pay its bonds, the obligation remains.⁵

A court order enforcing breach of express and implied contract claims against a state is not barred by the doctrine of separation of powers where a statute authorizes the judiciary to enter a judgment against the state in contract disputes.⁶

A State, when sued, may assert the defense of the statute of limitations.⁷

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Footnotes

- 1 [State ex rel. Cashman v. Sims](#), 130 W. Va. 430, 43 S.E.2d 805, 172 A.L.R. 1389 (1947).
As to tort liability, see [Am. Jur. 2d, Municipal, County, School, and State Tort Liability §§ 1 et seq.](#)
- 2 [General Services Com'n v. Little-Tex Insulation Co., Inc.](#), 39 S.W.3d 591 (Tex. 2001).
- 3 § 101.
- 4 [Campbell Bldg. Co. v. State Road Commission](#), 95 Utah 242, 70 P.2d 857 (1937).
As to waiver of immunity by entering into a contract, see § 129.

- 5 Campbell Bldg. Co. v. State Road Commission, 95 Utah 242, 70 P.2d 857 (1937).
6 Chase Home for Children v. New Hampshire Div. for Children, Youth and Families, 162 N.H. 720, 34 A.3d
1195 (2011).
7 Am. Jur. 2d, Limitation of Actions § 60.

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§ 97. Liability for interest

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West's Key Number Digest

West's Key Number Digest, [States](#) 171

The doctrine of sovereign immunity prevents the assessment of interest on a state's debts without the state's consent.¹ Thus, state entities generally are not liable for interest on their debts unless the constitution, a statute, or a contract calls for it.² The rule has been stated as being that the State is not required to pay interest unless that obligation is imposed by statute³ and that in the absence of a statute waiving sovereign immunity expressly or by clear implication, interest may not be awarded against the State.⁴ Under the general rule that a state is not bound by statute unless it is expressly named in it,⁵ a state does not become liable for payment of interest by reason of a general statute imposing liability for interest.⁶ Similarly, it has been stated that the rule that the state, as matter of sovereign immunity, may not be held to interest on its debts without its consent applies even though the applicable interest statute does not expressly exempt the state from its operation.⁷ On the other hand, a general statute on the legal rate of interest may apply to a state.⁸

If a State has waived sovereign immunity with regard to breach of contract claims,⁹ interest may be awarded on such a claim.¹⁰ Similarly, a State that has waived tort immunity may be liable for interest that accrued on unpaid judgments.¹¹

Because the states do not have sovereign immunity against the federal government, any rule exempting a sovereign from payment of prejudgment interest does not apply to a state's obligations to the federal government.¹²

Statutes that award interest on judgments against a state are strictly construed.¹³

CUMULATIVE SUPPLEMENT

Cases:

General rule is that the Commonwealth is not liable for postjudgment interest in the absence of a clear statutory waiver of sovereign immunity in that regard. *Sheriff of Suffolk County v. Jail Officers and Employees of Suffolk County*, 465 Mass. 584, 990 N.E.2d 1042 (2013).

[END OF SUPPLEMENT]

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Footnotes

- 1 Chun v. Board of Trustees of Employees' Retirement System of State of Hawai'i, 106 Haw. 416, 106 P.3d 339 (2005); Sanchez v. State, Dept. of Correction, 143 Idaho 239, 141 P.3d 1108 (2006); Our Lady of Lourdes Hosp. v. Franklin County, 120 Wash. 2d 439, 842 P.2d 956 (1993).
- 2 Boulis v. Florida Dept. of Transp., 733 So. 2d 959 (Fla. 1999); Indiana Dept. of Public Welfare v. Chair Lance Service, Inc., 523 N.E.2d 1373 (Ind. 1988); Beifuss v. Westerville Bd. of Educ., 37 Ohio St. 3d 187, 525 N.E.2d 20, 47 Ed. Law Rep. 670 (1988); Com. v. AMEC Civil, LLC, 280 Va. 396, 699 S.E.2d 499 (2010); Union Elevator & Warehouse Co., Inc. v. State ex rel. Dept. of Transp., 171 Wash. 2d 54, 248 P.3d 83 (2011). Prejudgment interest was awardable under a collective bargaining contract since the arbitrator's award was encompassed by a statute applicable to contract claims against the State, which waived immunity with regard to prejudgment interest. *State v. Alaska State Employees Ass'n, AFSCME, AFL-CIO*, 190 P.3d 720 (Alaska 2008).
- 3 Danco Exploration, Inc. v. State, Dept. of Natural Resources, 924 P.2d 432 (Alaska 1996); Pendell v. Department of Revenue, 315 Or. 608, 847 P.2d 846 (1993).
- 4 Foote v. State Personnel Commission, 118 N.H. 640, 392 A.2d 156 (1978); Rhode Island Public Telecommunications Authority v. Russell, 914 A.2d 984 (R.I. 2007). A relocation assistance statute does not waive the state's sovereign immunity for awards of interest on relocation assistance benefits. *Union Elevator & Warehouse Co., Inc. v. State ex rel. Dept. of Transp.*, 171 Wash. 2d 54, 248 P.3d 83 (2011).
- 5 § 6.
- 6 Brown v. State Highway Commission, 206 Kan. 49, 476 P.2d 233 (1970); Bradley v. Com., 301 S.W.3d 27 (Ky. 2009).
- 7 Our Lady of Lourdes Hosp. v. Franklin County, 120 Wash. 2d 439, 842 P.2d 956 (1993).
- 8 Mississippi Dept. of Human Services v. McNeel, 10 So. 3d 444 (Miss. 2009).
- 9 § 129.
- 10 The Profit Recovery Group, USA, Inc. v. Commissioner, Dept. of Administrative and Financial Services, 2005 ME 58, 871 A.2d 1237 (Me. 2005).
- 11 Young v. State of Oregon, 346 Or. 507, 212 P.3d 1258 (2009).
- 12 West Virginia v. U.S., 479 U.S. 305, 107 S. Ct. 702, 93 L. Ed. 2d 639 (1987).
- 13 In re Sherman, 565 A.2d 870 (R.I. 1989).

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§ 98. Procedural requirements

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West's Key Number Digest

West's Key Number Digest, States 203 to 211.5, 214, 215

A.L.R. Library

Persons or entities upon whom notice of injury or claim against state or state agencies may or must be served, 45 A.L.R.5th 173

Forms

Am. Jur. Pleading and Practice Forms, States, Territories, and Dependencies §§ 22 to 28 (pleadings in actions against state)

After having complied with prerequisites to suit,¹ and assuming that the State has given its consent to be sued, a plaintiff must present a demand in the ordinary manner complying with the rules governing complaints or the like.² The essential facts must be established according to the general rules of evidence applicable in civil actions, so generally, the plaintiff or claimant is required to prove a case against a state by a preponderance of the evidence.³

The proper respondents for lawsuits involving a state legislature are the speaker of the house and the president of the senate.⁴

In federal court, service on a state is effected by delivering a copy of the summons and complaint to its chief executive officer or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process on such a defendant.⁵

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Footnotes

- 1 § 127.
- 2 *Florida State Hospital for the Insane v. Durham Iron Co.*, 194 Ga. 350, 21 S.E.2d 216 (1942).
- 3 *Peterson, Shirley & Gunther v. State*, 120 Neb. 281, 232 N.W. 94, 70 A.L.R. 1205 (1930).
- 4 *Common Cause of West Virginia v. Tomblin*, 186 W. Va. 537, 413 S.E.2d 358 (1991).
- 5 Fed. R. Civ. P. 4(j)(2), generally discussed in Am. Jur. 2d, Process § 264.

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§ 99. Judgment and its effect

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West's Key Number Digest

West's Key Number Digest, [States](#) 212, 213

Forms

[Am. Jur. Pleading and Practice Forms, States, Territories, and Dependencies § 20](#) (Judgment—For claimant against state
—General form)

If a State permits itself to be sued, judgment may be entered against it the same as against an individual defendant.¹ Such a judgment will have the same effect as res judicata against the State and all its officers and agencies as would a judgment in an action against a private person.²

Under a statute providing that a judgment against the State is payable only out of funds appropriated for that purpose, the money must be appropriated to pay that specific judgment, and any effort by the judiciary to direct that the money be disbursed without such an appropriation would constitute an unlawful seizure of public funds.³ However, one such statute was intended to apply to judgments arising out of the exercise of the state's police powers and did not apply to a judgment against the State or its agencies for breach of contract.⁴

Recording judgments rendered against the State does not create judicial liens on the State's property.⁵

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Footnotes

- 1 Reed v. State, 78 S.W.2d 254 (Tex. Civ. App. Austin 1934), writ dismissed; *State ex rel. Wilson v. Young*, 44 Wyo. 6, 7 P.2d 216, 81 A.L.R. 114 (1932).
As to a state's waiver of sovereign immunity or consent to be sued, generally, see §§ 121 et seq.
- 2 Keifer & Keifer v. Reconstruction Finance Corporation, 306 U.S. 381, 59 S. Ct. 516, 83 L. Ed. 784 (1939); *State of Wisconsin v. State of Illinois*, 289 U.S. 395, 53 S. Ct. 671, 77 L. Ed. 1283 (1933); *Chicago, M. & St. P. Ry. Co. v. Public Utilities Commission of Idaho*, 47 Idaho 346, 275 P. 780 (1929); *Pan American Petroleum Corp. v. Gully*, 179 Miss. 847, 175 So. 185 (1937).
- 3 *Newman Marchive Partnership, Inc. v. City of Shreveport*, 979 So. 2d 1262 (La. 2008).
- 4 *Florida Dept. of Environmental Protection v. ContractPoint Florida Parks, LLC*, 986 So. 2d 1260 (Fla. 2008).
- 5 *Holly & Smith Architects, Inc. v. St. Helena Congregate Facility, Inc.*, 943 So. 2d 1037 (La. 2006).

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§ 100. Action to set aside judgment in favor of state or enjoin its enforcement

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West's Key Number Digest

West's Key Number Digest, [States](#) 212

An independent action to set aside a judgment in favor of a state¹ or to enjoin its enforcement² is a suit against a state, which may not be maintained without its consent. However, a State that voluntarily places itself in the position of a litigant may have waived its immunity.³

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Footnotes

¹ [Linderholm v. State](#), 146 Kan. 224, 69 P.2d 689 (1937).

² [State ex rel. Shafer v. Lowe](#), 54 N.D. 637, 210 N.W. 501 (1926).

³ [§ 128](#).

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§ 101. Generally

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West's Key Number Digest

West's Key Number Digest, [States](#) 191.1, 191.4(1)

Forms

[Am. Jur. Pleading and Practice Forms, States, Territories, and Dependencies](#) § 25 (Motion to dismiss—Complaint defective for failure to show consent of state to be sued)

Law Reviews and Other Periodicals

Donoho, Achieving Supreme Consensus: An Evolved Approach to State Sovereign Immunity, 88 Neb. L. Rev. 760 (2010)
Florey, Sovereign Immunity's Penumbra: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine, 43 Wake Forest L. Rev. 765 (2008)

Narechania, [An Offensive Weapon? An Empirical Analysis of the "Sword" of State Sovereign Immunity in State-Owned Patents](#), 110 Colum. L. Rev. 1574 (2010)

The general principle that a sovereign may not be sued without its own consent applies to states.¹ Accordingly, a suit may not be maintained against a State,² either in its own courts or in the courts of another state,³ by its own citizens,⁴ the citizens of another state, or the citizens or subjects of a foreign state⁵ unless the State has given its consent or otherwise waived its immunity.⁶

The doctrine of sovereign immunity is now justified as a rule of social policy, which protects the state from burdensome interference with the performance of its governmental functions and preserves its control over state funds, property, and instrumentalities.⁷ Public service might be hindered and public safety endangered if a state could be subjected to suit at the instance of any citizen.⁸

A state may have absolute immunity pursuant to its constitution.⁹ The doctrine of sovereign immunity was part of the common law,¹⁰ and thus, a constitutional provision that the common law should remain in force until altered by the legislature makes sovereign immunity part of the constitutional law of the state, subject to the right of the legislature to alter it.¹¹

The doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss,¹² or if raised, deprives the court of personal jurisdiction over the defendant state.¹³ The burden of proving a sovereign immunity defense is on the State.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

State of Alabama has absolute immunity from lawsuits. Const. Art. 1, § 14. [City of Gadsden v. Boman](#), 104 So. 3d 882 (Ala. 2012).

The common law doctrine of sovereign immunity, pursuant to which a government is immune from suit unless it consents to being sued, became Florida law when the common law of England in effect on July 4, 1776, was adopted by the Legislative Council of the Territory of Florida as the law of Florida and declared to be of full force and effect in 1829. [Barnett v. Department of Financial Services](#), 303 So. 3d 508 (Fla. 2020).

The State as sovereign is immune from suit except as it consents to be sued. [Nelson v. Hawaiian Homes Com'n](#), 130 Haw. 162, 307 P.3d 142 (2013).

Among other functions, the doctrine of sovereign immunity protects the public treasury against depletion by money judgments. [Smith v. Massachusetts Bay Transp. Authority](#), 462 Mass. 370, 968 N.E.2d 884 (2012).

It is inherent in the nature of sovereignty for a state not to be amenable to the suit of an individual without its consent. [Anthony K. v. State](#), 289 Neb. 523, 855 N.W.2d 802 (2014).

Pursuant to the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity. [White v. Trew](#), 736 S.E.2d 166, 288 Ed. Law Rep. 411 (N.C. 2013).

The state cannot be sued in its own courts or elsewhere unless it has expressly consented to such suits. *Martinez v. University of North Carolina*, 741 S.E.2d 330, 292 Ed. Law Rep. 431 (N.C. Ct. App. 2012).

[END OF SUPPLEMENT]

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Footnotes

- 1 *Sossamon v. Texas*, 131 S. Ct. 1651, 179 L. Ed. 2d 700 (2011) (this is inherent in nature of sovereignty); *Simmons v. Parizek*, 158 Conn. 304, 259 A.2d 642 (1969); *Helela v. State*, 49 Haw. 365, 418 P.2d 482 (1966); *Greene v. Com.*, 349 S.W.3d 892 (Ky. 2011); *State ex rel. State Park Bd. v. Tate*, 365 Mo. 1213, 295 S.W.2d 167, 59 A.L.R.2d 933 (1956); *City of Kenosha v. State*, 35 Wis. 2d 317, 151 N.W.2d 36 (1967). As to immunity or liability with regard to tort claims, see Am. Jur. 2d, Municipal, County, School, and State Tort Liability §§ 1 et seq.
- 2 *In Interest of A.V.B.*, 267 Ga. 728, 482 S.E.2d 275 (1997); *Commerce Bank of St. Joseph, N.A. v. State*, 251 Kan. 207, 833 P.2d 996 (1992); *Condon v. State of Maryland-University of Maryland*, 332 Md. 481, 632 A.2d 753 (1993); *State v. Holland*, 221 S.W.3d 639 (Tex. 2007).
- 3 *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U.S. 381, 59 S. Ct. 516, 83 L. Ed. 784 (1939); *Principality of Monaco v. State of Mississippi*, 292 U.S. 313, 54 S. Ct. 745, 78 L. Ed. 1282 (1934); *State of Missouri v. Fiske*, 290 U.S. 18, 54 S. Ct. 18, 78 L. Ed. 145 (1933); *Angelle v. State*, 212 La. 1069, 34 So. 2d 321, 2 A.L.R.2d 666 (1948); *Proctor v. Kardassilaris*, 115 Ohio St. 3d 71, 2007-Ohio-4838, 873 N.E.2d 872 (2007).
- 4 *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 64 S. Ct. 873, 88 L. Ed. 1121 (1944); *Heiser v. Severy*, 117 Mont. 105, 158 P.2d 501, 160 A.L.R. 319 (1945); *Miller v. Layton*, 133 N.J.L. 323, 44 A.2d 177, 1 A.L.R.2d 825 (N.J. Ct. Err. & App. 1945).
- 5 *In re State of New York*, 256 U.S. 490, 41 S. Ct. 588, 65 L. Ed. 1057 (1921); *Schippa v. West Virginia Liquor Control Commission*, 132 W. Va. 51, 53 S.E.2d 609, 9 A.L.R.2d 1284 (1948).
- 6 §§ 121 et seq.
- 7 *Woodruff v. City of Ottawa*, 263 Kan. 557, 951 P.2d 953 (1997); *State, Cent. Collection Unit v. DLD Associates Ltd. Partnership*, 112 Md. App. 502, 685 A.2d 873 (1996); *Glassman v. Glassman*, 309 N.Y. 436, 131 N.E.2d 721 (1956); *City of Virginia Beach v. Carmichael Development Co.*, 259 Va. 493, 527 S.E.2d 778 (2000); *Arnold Agency v. West Virginia Lottery Com'n*, 206 W. Va. 583, 526 S.E.2d 814 (1999).
- 8 *Pamela B. v. Ment*, 244 Conn. 296, 709 A.2d 1089 (1998); *Berek v. Metropolitan Dade County*, 396 So. 2d 756 (Fla. 3d DCA 1981), decision approved, 422 So. 2d 838 (Fla. 1982).
- 9 *Ex parte Bessemer Bd. of Educ.*, 68 So. 3d 782, 271 Ed. Law Rep. 1202 (Ala. 2011).
- 10 *Schmidt v. Grady County, Okl.*, 1997 OK 92, 943 P.2d 595 (Okla. 1997); *LTTS Charter School, Inc. v. Palasota*, 2012 WL 626498 (Tex. App. Dallas 2012).
- 11 *Shellhorn & Hill, Inc. v. State*, 55 Del. 298, 187 A.2d 71 (1962).
- 12 *184 Windsor Ave., LLC v. State*, 274 Conn. 302, 875 A.2d 498 (2005). Sovereign immunity deprives a trial court of subject matter jurisdiction for lawsuits in which the State or certain government units have been sued unless the State consents to suit. *Town of Flower Mound v. Rembert Enterprises, Inc.*, 2012 WL 662455 (Tex. App. Fort Worth 2012).
- 13 *German v. Wisconsin Dept. of Transp., Div. of State Patrol*, 2000 WI 62, 235 Wis. 2d 576, 612 N.W.2d 50 (2000). As to whether the defense is waived by participating in litigation without pleading it, see § 128.
- 14 *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999).

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§ 102. Scope of immunity

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West's Key Number Digest

West's Key Number Digest, States  191.1, 191.4(1), 191.10

State sovereign immunity applies regardless of whether a private plaintiff's suit is for monetary damages or some other type of relief.¹ It thus extends to actions in equity,² actions in which a contract or property interest of the state is involved,³ federal administrative adjudications of complaints by private parties against state entities,⁴ and actions in which retroactive monetary relief against a state is sought⁵ but does not extend to actions in which the award is prospective in nature.⁶ Immunity is not avoided by characterizing a claim for damages as for something else.⁷ Even a suit against a private party is barred by sovereign immunity where the judgment would be paid from public funds.⁸ However, in some jurisdictions, sovereign immunity does not bar an action against a state brought under a breach of contract theory.⁹

A State's immunity from suit particularly applies if the State is acting in its governmental capacity.¹⁰

While there is authority that an action to quiet title will not lie against the State,¹¹ it has also been held that a suit to settle the title to property does not conflict with the considerations on which a state's immunity rests.¹²

Immunity does not exist with respect to state property in another state acquired for a commercial enterprise with regard to claims arising out of the conduct of that enterprise.¹³

Sovereign immunity does not apply unless the relief sought involves some direct or substantial interest of the state.¹⁴ It does not apply if the State is the moving party seeking affirmative relief.¹⁵ Certain actions against state officers¹⁶ or for inverse condemnation do not come within sovereign immunity.¹⁷

CUMULATIVE SUPPLEMENT

Cases:

Generally, a suit against the State is barred by the sovereign-immunity doctrine if a judgment for the plaintiff will operate to control the action of the State or subject the State to liability. [Ark. Const. art. 5, § 20. Arkansas Game and Fish Commission v. Heslep](#), 2019 Ark. 226, 577 S.W.3d 1 (2019).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Federal Maritime Com'n v. South Carolina State Ports Authority](#), 535 U.S. 743, 122 S. Ct. 1864, 152 L. Ed. 2d 962 (2002).
- 2 [Philadelphia Life Ins. Co. v. Com.](#), 410 Pa. 571, 190 A.2d 111 (1963).
As to whether sovereign immunity applies to actions for injunctive or declaratory relief, see § 119.
- 3 [Lankford v. Platte Iron Works Co](#), 235 U.S. 461, 35 S. Ct. 173, 59 L. Ed. 316 (1915); [Hampton v. State Board of Education](#), 90 Fla. 88, 105 So. 323, 42 A.L.R. 1456 (1925).
- 4 [Federal Maritime Com'n v. South Carolina State Ports Authority](#), 535 U.S. 743, 122 S. Ct. 1864, 152 L. Ed. 2d 962 (2002).
Although a state's sovereign immunity from suit extended to federal adversary administrative proceedings initiated by state employees, the Secretary of Labor could intervene and thereby remove the sovereign immunity defense. [Rhode Island Dept. of Environmental Management v. U.S.](#), 304 F.3d 31 (1st Cir. 2002).
- 5 [Skaff v. Pridemore](#), 200 W. Va. 700, 490 S.E.2d 787 (1997).
- 6 [Skaff v. Pridemore](#), 200 W. Va. 700, 490 S.E.2d 787 (1997).
- 7 [Ex parte Dangerfield](#), 49 So. 3d 675 (Ala. 2010); [Pele Defense Fund v. Paty](#), 73 Haw. 578, 837 P.2d 1247 (1992).
- 8 [Davio v. Nebraska Dept. of Health and Human Services](#), 280 Neb. 263, 786 N.W.2d 655 (2010).
- 9 § 129.
- 10 [Noble v. Office of Child Support](#), 168 Vt. 349, 721 A.2d 121 (1998); [Columbia Steel Co. v. State](#), 34 Wash. 2d 700, 209 P.2d 482 (1949).
- 11 [West Park Shopping Center, Inc. v. Masheter](#), 6 Ohio St. 2d 142, 35 Ohio Op. 2d 216, 216 N.E.2d 761 (1966).
- 12 [O'Neill v. State Highway Dept.](#), 50 N.J. 307, 235 A.2d 1 (1967).
- 13 [Florida State Hospital for the Insane v. Durham Iron Co.](#), 194 Ga. 350, 21 S.E.2d 216 (1942).
- 14 [Glassman v. Glassman](#), 309 N.Y. 436, 131 N.E.2d 721 (1956).
- 15 [Arkansas Dept. of Human Services v. State](#), 312 Ark. 481, 850 S.W.2d 847 (1993).
- 16 §§ 109 et seq.
- 17 [Ex parte Bessemer Bd. of Educ.](#), 68 So. 3d 782, 271 Ed. Law Rep. 1202 (Ala. 2011).

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§ 103. Immunity to suit or from liability

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West's Key Number Digest

West's Key Number Digest, [States](#) 191.4(1)

Law Reviews and Other Periodicals

DeLuccio, [Keys to the Kingdom: The Need for Judicial Reform of Contractual Sovereign Immunity in Texas](#), 46 [Hous. L. Rev.](#) 1641 (2010)

It has been generally said that sovereign immunity is a jurisdictional immunity from suit.¹ There is also authority that sovereign immunity from suit is jurisdictional and bars suit, while immunity from liability is not jurisdictional and protects the state from judgments,² and the two are not coextensive.³ Immunity from suit results in any suit to enforce the asserted liability being dismissed for lack of subject matter jurisdiction.⁴ By entering into a contract, a State may waive its immunity from liability but not its immunity from suit, meaning that a remedy is barred until the legislature consents to suit.⁵

CUMULATIVE SUPPLEMENT

Cases:

States retain their sovereign immunity from private suits brought in the courts of other States; overruling *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416. *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485 (2019).

"Sovereign immunity" is jurisdictional immunity from suit. West's A.C.A. Const. Art. 5, § 20. *Arkansas State Claims Com'n v. Duit Const. Co., Inc.*, 2014 Ark. 432, 445 S.W.3d 496 (2014).

Sovereign immunity is jurisdictional immunity from suit, and jurisdiction must be determined entirely from the pleadings. West's A.C.A. Const. Art. 5, § 20. *Fitzgiven v. Dorey*, 2013 Ark. 346, 429 S.W.3d 234 (2013).

Under the *Comair* sovereign immunity test, 295 S.W.3d 91, courts first must look to the origin of the public entity in question, specifically, whether the entity was created by the state or a county, which is not entitled to immunity except in the legislative and judicial realms, and the second and more important inquiry is whether the entity exercises a function integral to state government. *Northern Kentucky Area Development District v. Wilson*, 612 S.W.3d 916 (Ky. 2020).

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Footnotes

- 1 *Arkansas Public Defender Com'n v. Greene County Circuit Court*, 343 Ark. 49, 32 S.W.3d 470 (2000).
- 2 *Harris County Hosp. Dist. v. Tomball Regional Hosp.*, 283 S.W.3d 838 (Tex. 2009).
- 3 *Envirotest Systems Corp. v. Commissioner of Motor Vehicles*, 293 Conn. 382, 978 A.2d 49 (2009) (stating that while a statute that waives immunity from suit also waives immunity from liability, a statute that explicitly waives immunity from liability does not necessarily implicitly waive immunity from suit).
- 4 *Envirotest Systems Corp. v. Commissioner of Motor Vehicles*, 293 Conn. 382, 978 A.2d 49 (2009); *Ben Bolt-Palito Blanco Consol. Independent School Dist. v. Texas Political Subdivisions Property/Cas. Joint Self-Insurance Fund*, 212 S.W.3d 320 (Tex. 2006).
- 5 *Ben Bolt-Palito Blanco Consol. Independent School Dist. v. Texas Political Subdivisions Property/Cas. Joint Self-Insurance Fund*, 212 S.W.3d 320 (Tex. 2006).
As to waiver of immunity by entering into a contract, see § 129.

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§ 104. Abrogation or limitation of doctrine

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West's Key Number Digest

West's Key Number Digest, [States](#) 191.1

Sovereign immunity prevails, except where abolished or modified by constitutional and statutory law, as interpreted and applied by the courts.¹ Where the doctrine is held to be in disfavor,² the courts are disposed to hear an action against the State unless good reason prevents that.³

In some states, the doctrine of sovereign immunity has been judicially abrogated⁴ although other courts have regarded the question of its abrogation as one of public policy to be decided by the legislature.⁵

CUMULATIVE SUPPLEMENT

Cases:

Sovereign immunity is a judicially created common law concept that is subject to judicial abrogation or limitation. [Randall v. Haddad](#), 468 Mass. 347, 10 N.E.3d 1099 (2014).

[END OF SUPPLEMENT]

Footnotes

- 1 [People v. Superior Court of City and County of San Francisco](#), 29 Cal. 2d 754, 178 P.2d 1, 40 A.L.R.2d 919 (1947).
As to waiver of the doctrine or consent to be sued, see §§ 121 et seq.
- 2 [Taylor v. New Jersey Highway Authority](#), 22 N.J. 454, 126 A.2d 313, 62 A.L.R.2d 1211 (1956).
- 3 [O'Neill v. State Highway Dept.](#), 50 N.J. 307, 235 A.2d 1 (1967).
- 4 [Evans v. Board of County Com'rs of El Paso County](#), 174 Colo. 97, 482 P.2d 968 (1971).
- 5 [Crowder v. Department of State Parks](#), 228 Ga. 436, 185 S.E.2d 908 (1971).

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§ 105. Effect of United States Constitution

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West's Key Number Digest

West's Key Number Digest, [States](#) 191.1

Although the sovereign immunity of the states derives from the common-law tradition, the structure and history of the United States Constitution make clear that the immunity exists today by constitutional design.¹ While the Supreme Court has said that state sovereign immunity is a constitutional doctrine that is meant to be both immutable by Congress and resistant to trends,² 11th Amendment immunity may be abrogated by Congress under certain circumstances.³

Even without its consent, a state may be sued in a federal forum by the United States or a federal instrumentality.⁴ In ratifying the Constitution, the states consented to suits brought by other states or by the federal government.⁵

Generally speaking, Congress's powers under the United States Constitution do not include the power to subject states to suit in state court by private plaintiffs⁶ for damages⁷ unless there is compelling evidence that the states were required to surrender this power to Congress pursuant to the constitutional design.⁸ The power of Congress under Section 5 of the 14th Amendment to enforce the provisions of the amendment includes the power to abrogate state sovereign immunity by authorizing private suits for damages against a state for violations of the amendment.⁹ Subjecting states to suits for damages pursuant to the Enforcement Clause of the 14th Amendment requires more than a theory why abrogating the states' immunity aids in, or advances, a stated congressional purpose, but Congress must identify a pattern of constitutional violations and tailor a remedy congruent and proportional to those documented violations.¹⁰

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Footnotes

- 1 Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999).
- 2 College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 119 S. Ct. 2219, 144 L. Ed. 2d 605, 135 Ed. Law Rep. 362 (1999).
- 3 § 106.
- 4 Department of Employment v. U.S., 385 U.S. 355, 87 S. Ct. 464, 17 L. Ed. 2d 414 (1966).
- 5 Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999); Matter of Estate of Fernandez, 123 F.3d 241 (5th Cir. 1997), amended on other grounds on denial of reh'g, 130 F.3d 1138 (5th Cir. 1997).
- 6 Kimel v. Florida Bd. of Regents, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522, 140 Ed. Law Rep. 825, 187 A.L.R. Fed. 543 (2000); Schall v. Wichita State University, 269 Kan. 456, 7 P.3d 1144, 146 Ed. Law Rep. 1137 (2000).
- 7 Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999).
- 8 Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999).
- 9 Coleman v. Court of Appeals of Maryland, 132 S. Ct. 1327 (2012); U.S. v. Georgia, 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006).
- 10 Coleman v. Court of Appeals of Maryland, 132 S. Ct. 1327 (2012) (further holding that Congress expressed its clear purpose in the language of the Family and Medical Leave Act to abrogate state sovereign immunity, given that it subjected any public agency, as defined in the Act, to suit under that Act but did not validly abrogate states' sovereign immunity in the self-care provision [29 U.S.C.A. § 2612(a)(1)(D)], requiring that employers, including state employers, allow employees to take unpaid leave to care for their own serious health conditions since Congress failed to identify a pattern of constitutional violations and tailor a remedy congruent and proportional to them).

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72 Am. Jur. 2d States, Etc. § 106

American Jurisprudence, Second Edition | May 2021 Update

States, Territories, and Dependencies

Jack K. Levin, J.D.

I. States

K. Actions and Liability

2. Liability of and Actions Against States

b. Sovereign Immunity

(1) In General

§ 106. Effect of United States Constitution—11th Amendment

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West's Key Number Digest

West's Key Number Digest, [Federal Courts](#) 265

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[Unjustified Institutionalization of Individuals with Disabilities as Violation of Federal Antidiscrimination Provisions—Post-Olmstead Cases, 90 A.L.R. Fed. 2d 1](#)

[Immunity of State from Civil Suits Under Eleventh Amendment—Supreme Court Cases, 187 A.L.R. Fed. 175](#)

Law Reviews and Other Periodicals

Fruehwald, [The Supreme Court's Confusing State Sovereign Immunity Jurisprudence, 56 Drake L. Rev. 253 \(2008\)](#)

Greenblatt, [What's Dignity Got to do With it? Using Anti-Commandeering Principles to Preserve State Sovereign Immunity, 45 Cal. W. L. Rev. 1 \(2008\)](#)

Lash, [Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction, 50 Wm. & Mary L. Rev. 1577 \(2009\)](#)

Pradhan, [Rethinking the Eleventh Amendment: Sovereign Immunity in the United States and the European Union, 11 N.Y.U. J. Legis. & Pub. Pol'y 215 \(2007\)](#)

Yap, *State Sovereign Immunity and the Law of Nations: Incorporating a Commercial Act Exception Into Eleventh Amendment Sovereign Immunity*, 78 U. Cin. L. Rev. 81 (2009)

The 11th Amendment provides that the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.¹ This is an absolute bar to suits against a state, without its consent, by citizens of another state or by citizens or subjects of a foreign state in federal court.² Thus, the 11th Amendment gives the states the legal power to assert a sovereign immunity defense, should they choose to do so.³

Absent waiver⁴ or valid abrogation of a state's 11th Amendment sovereign immunity, federal courts may not entertain a private person's suit against a state.⁵ Congress may abrogate the states' 11th Amendment immunity when it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority, other than based on Article I.⁶ For instance, Title II of the Americans with Disabilities Act, prohibiting discrimination by a public entity, abrogated 11th Amendment immunity through enforcement of the 14th Amendment, to the extent that the alleged conduct actually violates the 14th Amendment,⁷ but Title I on employment discrimination and reasonable accommodation did not abrogate that immunity since its requirements go beyond what the Constitution demands.⁸

Observation:

The sovereign immunity of the states neither derives from nor is limited by the 11th Amendment,⁹ and the bare text of the 11th Amendment is not an exhaustive description of the states' constitutional immunity from suit.¹⁰

A question of a state's immunity from suit under the 11th Amendment is not present if an action is brought against the State in a state court because the amendment, by its terms, restrains only the judicial power of the United States.¹¹ However, because the law pertaining to 11th Amendment sovereign immunity should also be generally applicable in state court, a state court may incorporate those concepts by reference¹² and may claim immunity in its own courts if the 11th Amendment would bar a suit in federal court¹³ even if the cause of action is based on federal law.¹⁴

Even though the 11th Amendment is not expressly applicable to a suit against a state by its own citizens, a federal court may not entertain such a suit without the state's consent.¹⁵

A State may recover money damages from another state in an action under the Supreme Court's original jurisdiction, without running afoul of the 11th Amendment, where the plaintiff state is the real party in interest and has the right to control the disposition of any recovery.¹⁶

The general criterion for determining when a suit is in fact against the sovereign, for 11th Amendment purposes, is the effect of the relief sought, not who is bringing the lawsuit.¹⁷ A federal court may not award retrospective relief against a state, such as money damages or its equivalent, if the State invokes its 11th Amendment immunity.¹⁸ A bankruptcy court's exercise of its in rem jurisdiction to discharge a student loan held by a state does not infringe state sovereignty and thus is not a suit against a state under the 11th Amendment.¹⁹ Also, enforcement of a consent decree against a state is not barred by the 11th Amendment, even if the decree included obligations that were not required under federal law, since it was a federal court order.²⁰

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Footnotes

- 1 [U.S. Const. Amend. XI.](#)
Federal jurisdiction over suits against unconsenting states was not contemplated by the Constitution when establishing the judicial power of the United States. [Sossamon v. Texas](#), 131 S. Ct. 1651, 179 L. Ed. 2d 700 (2011).
- 2 [Keifer & Keifer v. Reconstruction Finance Corporation](#), 306 U.S. 381, 59 S. Ct. 516, 83 L. Ed. 784 (1939); [Principality of Monaco v. State of Mississippi](#), 292 U.S. 313, 54 S. Ct. 745, 78 L. Ed. 1282 (1934).
As to when an action in federal court against a state agency or officer is barred by the 11th Amendment as an action against the State, see § 111.
- 3 [Wisconsin Dept. of Corrections v. Schacht](#), 524 U.S. 381, 118 S. Ct. 2047, 141 L. Ed. 2d 364 (1998).
Sovereign immunity under the 11th Amendment is the privilege of the sovereign not to be sued without its consent. [Virginia Office for Protection and Advocacy v. Stewart](#), 131 S. Ct. 1632, 179 L. Ed. 2d 675 (2011).
§ 126.
- 4 [Virginia Office for Protection and Advocacy v. Stewart](#), 131 S. Ct. 1632, 179 L. Ed. 2d 675 (2011).
- 5 [Board of Trustees of University of Alabama v. Garrett](#), 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866, 151 Ed. Law Rep. 35 (2001); [Kimel v. Florida Bd. of Regents](#), 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522, 140 Ed. Law Rep. 825, 187 A.L.R. Fed. 543 (2000).
Congress must make its intention to abrogate state sovereign immunity unmistakably clear in the language of the statute. [Coleman v. Court of Appeals of Maryland](#), 132 S. Ct. 1327 (2012).
- 6 [U.S. v. Georgia](#), 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006); [Tennessee v. Lane](#), 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004).
- 7 [Board of Trustees of University of Alabama v. Garrett](#), 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866, 151 Ed. Law Rep. 35 (2001).
- 8 [Alden v. Maine](#), 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999); [In re Lazar](#), 237 F.3d 967 (9th Cir. 2001).
- 9 [Alden v. Maine](#), 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999).
- 10 [Maine v. Thiboutot](#), 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980).
- 11 [Prager v. State, Dept. of Revenue](#), 271 Kan. 1, 20 P.3d 39 (2001).
- 12 [Morris v. Massachusetts Maritime Academy](#), 409 Mass. 179, 565 N.E.2d 422, 65 Ed. Law Rep. 147 (1991).
- 13 [Montgomery v. Board of Trustees of Purdue University](#), 849 N.E.2d 1120, 210 Ed. Law Rep. 445 (Ind. 2006).
- 14 [Tennessee Student Assistance Corp. v. Hood](#), 541 U.S. 440, 124 S. Ct. 1905, 158 L. Ed. 2d 764 (2004); [Idaho v. Coeur d'Alene Tribe of Idaho](#), 521 U.S. 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997); [Papasan v. Allain](#), 478 U.S. 265, 106 S. Ct. 2932, 92 L. Ed. 2d 209, 32 Ed. Law Rep. 1197 (1986); [Georgia Railroad & Banking Co. v. Redwine](#), 342 U.S. 299, 72 S. Ct. 321, 96 L. Ed. 335 (1952).
- 15 [Kansas v. Colorado](#), 533 U.S. 1, 121 S. Ct. 2023, 150 L. Ed. 2d 72 (2001).
- 16 [Virginia Office for Protection and Advocacy v. Stewart](#), 131 S. Ct. 1632, 179 L. Ed. 2d 675 (2011).
- 17 [Frew ex rel. Frew v. Hawkins](#), 540 U.S. 431, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004).
- 18 [Tennessee Student Assistance Corp. v. Hood](#), 541 U.S. 440, 124 S. Ct. 1905, 158 L. Ed. 2d 764 (2004).
- 19 [Frew ex rel. Frew v. Hawkins](#), 540 U.S. 431, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004).
- 20 [Frew ex rel. Frew v. Hawkins](#), 540 U.S. 431, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004).

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I. States

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(2) State Bodies

§ 107. Generally

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A state's immunity from suit extends to boards, commissions, instrumentalities, and agencies¹ if those entities are conducting the state's governmental functions² and do not have independent proprietary powers or functions.³ However, sovereign immunity does not apply to the activities of an agency with independent proprietary powers and functions.⁴ The test for determining whether a legislatively created body is an immediate and strictly government agency for purposes of a sovereign immunity involves assessing the character of the power delegated to the body, the relation of the body to the state, and the nature of the function performed by the body.⁵ Also, to determine whether an entity is entitled to 11th Amendment immunity, a court must first determine whether the State has indicated an intention, either explicitly by statute or implicitly through the structure of the entity, that the entity share the state's sovereign immunity, and if either an explicit or implicit intention is found, the court must determine whether the state's treasury would be at risk in the event of an adverse judgment.⁶

A suit is against the state, and therefore subject to the defense of sovereign immunity, if it is against—

— the legislature or its committees.⁷

— an administrative agency or department.⁸

— a state college or university.⁹

The fact that a money judgment is sought against a state agency does not make the action one against the state, if the agency is in the position of a disinterested stakeholder, and can neither lose nor gain by a determination of which claimant is entitled to the fund.¹⁰

While declaratory relief is generally not available against a state legislature,¹¹ it has also been held that a state legislature is not immune from a declaratory judgment action to decide whether it has failed to fulfill a constitutional mandate.¹²

CUMULATIVE SUPPLEMENT

Cases:

Under Kentucky law, to show that an entity claiming state sovereign immunity performs a function integral to state government, as required under *Comair* for the application of state sovereign immunity, the entity must show that it addresses state level government concerns that are common to all citizens of the state; serving purely local concerns does not count. *Stanford v. U.S.*, 948 F. Supp. 2d 729 (E.D. Ky. 2013).

Doctrine of sovereign immunity applies not only to a state but to a state agency such as the New York Department of Health (DOH). *Anghel v. New York State Dept. of Health*, 947 F. Supp. 2d 284 (E.D. N.Y. 2013).

Wisconsin's sovereign immunity does not apply to the activities of a state-created agency with independent proprietary powers and function, or an independent going concern. *Wis. Const. art. 4, § 27. UWM Student Association v. Lovell*, 266 F. Supp. 3d 1121, 349 Ed. Law Rep. 1063 (E.D. Wis. 2017).

State-agent immunity does not apply to a claim of state immunity by an agency of the state itself. Const. Art. 1, § 14. *Ex parte Bessemer City Bd. of Educ.*, 143 So. 3d 726 (Ala. 2013).

Sovereign immunity applies to the State lottery corporation, as an instrumentality of the State. *Georgia Lottery Corporation v. Vasaya*, 353 Ga. App. 52, 836 S.E.2d 107 (2019).

The sovereign State is immune from suit for money damages, except where there has been a clear relinquishment of immunity and the State has consented to be sued. *Kaleikini v. Yoshioka*, 304 P.3d 252 (Haw. 2013).

[END OF SUPPLEMENT]

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Footnotes

1 Georgia Dept. of Transp. v. Smith, 12 Fulton County D. Rep. 770, 2012 WL 639118 (Ga. Ct. App. 2012); Department of Corrections v. Furr, 23 S.W.3d 615 (Ky. 2000); Maryland State Highway Admin. v. Kim, 353 Md. 313, 726 A.2d 238 (1999); *In re Interest of Krystal P.*, 251 Neb. 320, 557 N.W.2d 26 (1996); Meyer v. Walls, 347 N.C. 97, 489 S.E.2d 880 (1997); Clarke v. Oregon Health Sciences University, 343 Or. 581, 175 P.3d 418 (2007); Texas Dept. of Transp. v. Able, 35 S.W.3d 608 (Tex. 2000); German v. Wisconsin Dept. of Transp., Div. of State Patrol, 2000 WI 62, 235 Wis. 2d 576, 612 N.W.2d 50 (2000).

The immunity clause of a state constitution affords absolute immunity to both the state and state agencies. *Ex parte Jefferson County Dept. of Human Resources*, 63 So. 3d 621 (Ala. 2010).

A suit against a state agency constitutes a suit against the state for purposes of sovereign immunity. [PRN Associates LLC v. State, Dept. of Admin.](#), 2009 WI 53, 317 Wis. 2d 656, 766 N.W.2d 559 (2009).

2 [Autry v. Western Kentucky University](#), 219 S.W.3d 713, 219 Ed. Law Rep. 811 (Ky. 2007) (and supported by money from the state treasury); [Glassman v. Glassman](#), 309 N.Y. 436, 131 N.E.2d 721 (1956); [Smith v. Hefner](#), 235 N.C. 1, 68 S.E.2d 783 (1952).

3 [City of Kenosha v. State](#), 35 Wis. 2d 317, 151 N.W.2d 36 (1967).

4 [German v. Wisconsin Dept. of Transp.](#), Div. of State Patrol, 2000 WI 62, 235 Wis. 2d 576, 612 N.W.2d 50 (2000).

5 [Rodgers v. Hopper](#), 768 So. 2d 963 (Ala. 2000).

6 [Redondo Const. Corp. v. Puerto Rico Highway and Transp. Authority](#), 357 F.3d 124 (1st Cir. 2004).

7 [National Ass'n for Advancement of Colored People v. Committee on Offenses Against Administration of Justice](#), 201 Va. 890, 114 S.E.2d 721 (1960).

8 [Singletary v. Missouri Dept. of Corrections](#), 423 F.3d 886 (8th Cir. 2005); [Miccosukee Tribe of Indians of Florida v. Florida State Athletic Com'n](#), 226 F.3d 1226 (11th Cir. 2000); [Ex parte Alabama Dept. of Transp.](#), 978 So. 2d 17 (Ala. 2007); [Awakuni v. Awana](#), 115 Haw. 126, 165 P.3d 1027 (2007) (state employee benefit trust fund); [Schwing v. Miles](#), 367 Ill. 436, 11 N.E.2d 944, 113 A.L.R. 1504 (1937) (department of public works and buildings); [Angelle v. State](#), 212 La. 1069, 34 So. 2d 321, 2 A.L.R.2d 666 (1948); [Chase Home for Children v. New Hampshire Div. for Children, Youth and Families](#), 162 N.H. 720, 34 A.3d 1195 (2011); [Mullin v. Com., Dept. of Transp.](#), 582 Pa. 127, 870 A.2d 773 (2005); [Davidson v. Lewis Bros. Bakery](#), 227 S.W.3d 17 (Tenn. 2007) (second injury fund); [Texas Dept. of Transp. v. City of Sunset Valley](#), 146 S.W.3d 637 (Tex. 2004).

9 [Power v. Summers](#), 226 F.3d 815, 147 Ed. Law Rep. 434 (7th Cir. 2000); [Cerrato v. San Francisco Community College Dist.](#), 26 F.3d 968, 92 Ed. Law Rep. 50 (9th Cir. 1994); [University of Texas at Austin v. Vratil](#), 96 F.3d 1337, 112 Ed. Law Rep. 700, 35 Fed. R. Serv. 3d 1527 (10th Cir. 1996); [Doe v. Bd. of Regents of University of Nebraska](#), 280 Neb. 492, 788 N.W.2d 264, 259 Ed. Law Rep. 875 (2010).

10 [Glassman v. Glassman](#), 309 N.Y. 436, 131 N.E.2d 721 (1956).

11 [Town of Milton v. Com.](#), 416 Mass. 471, 623 N.E.2d 482 (1993).

12 [Philpot v. Patton](#), 837 S.W.2d 491 (Ky. 1992).

As to whether sovereign immunity applies to actions for declaratory relief, see § 119.

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§ 108. Corporation created by state

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West's Key Number Digest

West's Key Number Digest, [States](#) 191.10, 193

The question whether a corporation created as an agency of, or the stock of which is owned in whole or in part by, a state is subject to or immune from suit, and the extent of its immunity is one of legislative intention.¹ The mere fact that such a corporation is an agency of the state does not, in and of itself, render it immune from suit.² The mere fact that a state owns all of its stock also is not alone sufficient to identify the corporation with its stockholder so as to render it immune.³

Some public corporations are entitled to the state's immunity while others are not.⁴ In determining whether an entity is a state agency for sovereign immunity purposes, the important factors are whether the entity was created by the state to perform a state function so that a judgment against it would, in essence, injure the state.⁵ Some factors considered when determining whether an entity is an arm of a state subject to immunity under the 11th Amendment include whether a money judgment would be satisfied out of state funds, the entity performs central governmental functions, the entity may sue or be sued, the entity has the power to take property in its own name or only in the name of the state, and the entity's corporate status.⁶ However, neither its corporate status nor the fact that it has the power to sue and be sued as an independent entity wholly precludes the entity from being considered an arm of the state and entitled to sovereign immunity.⁷ Although a statute providing that an entity may sue and be sued is not determinative of the entity's status for the purposes of sovereign immunity, it does show the intent of the legislature to create a separate entity rather than an agency or an arm of the state within the state's constitutional immunity.⁸ On the other hand, express authorization to be sued does not abrogate immunity granted by a state constitution if the legislature does not have the authority to waive it.⁹

An action may be maintained against a corporation created by a State if the corporation acts in a proprietary capacity and the State does not exercise governmental power through it, such as corporations organized for the operation of water and power plants, swimming pools, parks, and other recreational facilities.¹⁰ However, if a corporation is performing essentially public or governmental purposes, it is in effect a part of the government so an action against it is in effect a suit against the government, which, in the absence of the state's consent to the suit, may not be maintained.¹¹ If such a corporation exercises both public and private functions, it is immune from suit to the extent that the suit is based on the exercise of its public functions but is subject to suit to the extent that the suit is based on an exercise of private functions.¹²

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Footnotes

- 1 Keifer & Keifer v. Reconstruction Finance Corporation, 306 U.S. 381, 59 S. Ct. 516, 83 L. Ed. 784 (1939); Federal Land Bank of St. Louis v. Priddy, 295 U.S. 229, 55 S. Ct. 705, 79 L. Ed. 1408 (1935); Snead v. Society for Prevention of Cruelty to Animals of Pennsylvania, 604 Pa. 166, 985 A.2d 909 (2009) (as determined from plain language of the legislation); Home Owners' Loan Corp. v. Hardie & Caudle, 171 Tenn. 43, 100 S.W.2d 238, 108 A.L.R. 702 (1936).
- 2 Keifer & Keifer v. Reconstruction Finance Corporation, 306 U.S. 381, 59 S. Ct. 516, 83 L. Ed. 784 (1939); U. S. ex rel. Skinner & Eddy Corp. v. McCarl, 275 U.S. 1, 48 S. Ct. 12, 72 L. Ed. 131 (1927).
- 3 Sloan Shipyards Corp. v. U.S. Shipping Bd. Emergency Fleet Corp., 258 U.S. 549, 42 S. Ct. 386, 66 L. Ed. 762 (1922).
- 4 Vandenberg v. Aramark Educational Services, Inc., 81 So. 3d 326 (Ala. 2011).
A state lottery corporation was a state instrumentality and entitled to assert sovereign immunity. Kyle v. Georgia Lottery Corp., 290 Ga. 87, 718 S.E.2d 801 (2011).
- 5 Snead v. Society for Prevention of Cruelty to Animals of Pennsylvania, 604 Pa. 166, 985 A.2d 909 (2009).
- 6 Aguon v. Commonwealth Ports Authority, 316 F.3d 899 (9th Cir. 2003).
- 7 Guerrero v. Alaska Housing Finance Corp., 6 P.3d 250 (Alaska 2000).
- 8 Stallings & Sons, Inc. v. Alabama Bldg. Renovation Finance Authority, 689 So. 2d 790 (Ala. 1996).
- 9 Schippa v. West Virginia Liquor Control Commission, 132 W. Va. 51, 53 S.E.2d 609, 9 A.L.R.2d 1284 (1948).
- 10 Schippa v. West Virginia Liquor Control Commission, 132 W. Va. 51, 53 S.E.2d 609, 9 A.L.R.2d 1284 (1948).
- 11 Schippa v. West Virginia Liquor Control Commission, 132 W. Va. 51, 53 S.E.2d 609, 9 A.L.R.2d 1284 (1948); Harrison v. Wyoming Liquor Commission, 63 Wyo. 13, 177 P.2d 397 (1947).
- 12 Standard Oil Co. of New Jersey v. U.S., 25 F.2d 480 (S.D. Ala. 1928); Com. Finance Corp. v. Landis, 261 F. 440 (E.D. Pa. 1919).

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(3) State Officers

(a) In General

§ 109. Suits considered as against state

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West's Key Number Digest

West's Key Number Digest, [States](#) 191.10

Suing state public officials in their official capacities is tantamount to suing the State or its affiliated entities themselves, and any immunity protecting those state entities will similarly shield the public officials affiliated with them when they are sued in their official capacities.¹ Because a state can act only through its officers and agents, a suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the state, which has sovereign immunity.² Thus, a suit against a state official acting in an official capacity is essentially or no different from a suit against the State.³ On the other hand, the mere fact that a suit is against a state officer does not mean that the suit is to be considered as one against the state for the purpose of immunity,⁴ such as where the officer acts outside one's authority.⁵

CUMULATIVE SUPPLEMENT

Cases:

Because a suit against a state official in his official capacity is considered a suit against the state, courts regularly dismiss as redundant claims against agents in their official capacities when the principal entity is also named as a defendant in the suit. [McGath v. Hamilton Local School Dist.](#), 848 F. Supp. 2d 831 (S.D. Ohio 2012).

State officers and employees, in their official capacities and individually, are absolutely immune from suit when the action is, in effect, one against the State for purposes of State immunity. Const. Art. 1, § 14. [Ex parte Moulton, 116 So. 3d 1119 \(Ala. 2013\)](#).

The meaning of individual relevant to analysis of whether public officials can be sued in their individual capacities, is part of the expression individual capacity, which is a term of art in the context of sovereign immunity law, not the more common usage of that word as a synonym for singular. [Dawson County Board of Commissioners v. Dawson Forest Holdings, LLC, 850 S.E.2d 870 \(Ga. Ct. App. 2020\)](#).

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Footnotes

- 1 [Ex parte Lawley, 38 So. 3d 41 \(Ala. 2009\); Womble By and Through Havard on Behalf of Womble v. Singing River Hosp., 618 So. 2d 1252 \(Miss. 1993\); City of East Orange v. Palmer, 47 N.J. 307, 220 A.2d 679 \(1966\)](#) (action against the Commissioner of State Highway Department and State Treasurer).
- 2 [Markley v. Department of Public Utility Control, 301 Conn. 56, 23 A.3d 668 \(2011\)](#) (also stating that exceptions to this doctrine are few and narrowly construed); [Gray v. Virginia Secretary of Trans., 276 Va. 93, 662 S.E.2d 66 \(2008\)](#).
- 3 [Kaho'ohanohano v. State, 114 Haw. 302, 162 P.3d 696 \(2007\); Orozco v. Day, 281 Mont. 341, 934 P.2d 1009 \(1997\); Sisney v. Reisch, 2008 SD 72, 754 N.W.2d 813 \(S.D. 2008\); Texas A & M University System v. Koseoglu, 233 S.W.3d 835, 224 Ed. Law Rep. 985 \(Tex. 2007\)](#).
A court must determine whether actions against individual state officials sued in their official capacities are in reality actions against the State and therefore barred under the doctrine of state sovereign immunity. [Doe v. Bd. of Regents of University of Nebraska, 280 Neb. 492, 788 N.W.2d 264, 259 Ed. Law Rep. 875 \(2010\)](#).
- 4 [Pierce v. Green, 229 Iowa 22, 294 N.W. 237, 131 A.L.R. 335 \(1940\)](#).
- 5 § 115.

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(a) In General

§ 110. Suits considered as against state—Factors considered

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West's Key Number Digest, [States](#) 191.10

Whether a suit against a state officer is in substance one against the state is not determined solely by looking at the parties named but also depends on the nature of the litigation, the relief sought, and the way in which it affects the state.¹ An action brought nominally against a state employee in his or her individual capacity will generally be considered a claim against the State and will be barred by sovereign immunity if a judgment in favor of the plaintiff could operate to control the actions of the State or subject it to liability.² Thus, a complaint seeking money damages against a state employee in his or her official capacity is considered a complaint against the State and is barred by the State's immunity.³ Actions that do not come within an immunity provision of a state constitution include to compel state officials to perform their legal duties, to enjoin state officials from enforcing an unconstitutional law, to compel state officials to perform ministerial acts, and for an injunction or damages brought against state officials in their representative capacity and individually where it was alleged that they had acted fraudulently, in bad faith, beyond their authority or in a mistaken interpretation of the law.⁴

It is the nature of the suit or relief demanded that the courts consider in determining whether a suit against a state officer is in fact one against the State within the rule of immunity of the state from suit and not the character of the office of the person against whom the suit is brought.⁵

CUMULATIVE SUPPLEMENT

Cases:

In determining whether an agency constitutes an arm of the state entitled to sovereign immunity, the court considers the powers, characteristics, and relationships created by state law in order to determine whether the suit is in reality one against the state. [Seals v. Mississippi, 998 F. Supp. 2d 509 \(N.D. Miss. 2014\)](#).

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Footnotes

- 1 Pack v. Blankenship, 612 So. 2d 399 (Ala. 1992); Currie v. Lao, 148 Ill. 2d 151, 170 Ill. Dec. 297, 592 N.E.2d 977 (1992); Brody v. Leamy, 90 Misc. 2d 1, 393 N.Y.S.2d 243 (Sup 1977).
- 2 People ex rel. Manning v. Nickerson, 184 Ill. 2d 245, 234 Ill. Dec. 375, 702 N.E.2d 1278 (1998).
- 3 Ex parte Jefferson County Dept. of Human Resources, 63 So. 3d 621 (Ala. 2010).
- 4 Ex parte Bessemer Bd. of Educ., 68 So. 3d 782, 271 Ed. Law Rep. 1202 (Ala. 2011).
- 5 Glass v. Prudential Ins. Co. of America, 246 Ala. 579, 22 So. 2d 13 (1945); New York State Thruway Authority v. Hurd, 29 A.D.2d 157, 286 N.Y.S.2d 436 (3d Dep't 1968).

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West's Key Number Digest

West's Key Number Digest, [Federal Courts](#)  269

Although the 11th Amendment, which bars some actions against states,¹ bars action against state officials in their official capacities, it does not affect suits against them in their individual capacities.² Only states and state officers acting in their official capacity are immune from suit for damages in federal court; other joined parties are not.³

The *Ex Parte Young* doctrine creates an exception to the 11th Amendment's grant of sovereign immunity by permitting suits against individual state officers for prospective relief against ongoing violations of federal law.⁴ For a state agency to invoke the *Ex parte Young* exception, it must have a federal right that it possesses against the State and authority to sue other state officials to enforce that right, free from any internal veto by the state government.⁵

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Footnotes

1 § 106.

2 Thomas v. Gunter, 32 F.3d 1258 (8th Cir. 1994).

The 11th Amendment barred a suit against the executive director of a state gaming agency, since he was a state official sued in his official capacity, and the claim was founded solely on his alleged failure to comply with state law. *Hartman v. Kickapoo Tribe Gaming Com'n*, 319 F.3d 1230 (10th Cir. 2003).

As to the status of state officials with regard to suits under 42 U.S.C.A. § 1983, see *Am. Jur. 2d, Civil Rights § 89*.

3 Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001).

4 *Am. Jur. 2d, Federal Courts § 962.*

5 *Virginia Office for Protection and Advocacy v. Stewart*, 131 S. Ct. 1632, 179 L. Ed. 2d 675 (2011).

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West's Key Number Digest, [States](#) 191.9(1), 193

If an action is in essence one for the recovery of money from a state, the State is the real party in interest and is entitled to invoke its sovereign immunity from suit even if individual officials are named as defendants.¹ If the action is against the officer in his or her official capacity and would require payment from state funds, it is a suit against the State.² While it has been said that suits to require that state officials comply with statutory or constitutional provisions are not prohibited by sovereign immunity, even if a declaration to that effect compels the payment of money,³ private parties may not circumvent the state's sovereign immunity by characterizing a suit for money damages as being for other types of relief.⁴

The 11th Amendment bars actions for damages against state officials in their official capacity⁵ even if an individual officer is named as defendant.⁶

CUMULATIVE SUPPLEMENT

Cases:

In an action against a state official for the recovery of money, the state is the real party in interest, because a judgment against a public servant in his official capacity imposes liability on the entity that he represents; as such, if not waived, sovereign immunity bars claims for money damages even where the plaintiff has named, as nominal defendants, individual state officials. [Neb. Const. art. 5, § 22. Sanitary and Improvement District No. 1, Butler County v. Adamy, 289 Neb. 913, 858 N.W.2d 168 \(2015\)](#).

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Footnotes

- 1 DaimlerChrysler Corp. v. Law, 284 Conn. 701, 937 A.2d 675 (2007); Kleban v. Morris, 363 Mo. 7, 247 S.W.2d 832 (1952); Town of Eagle v. Christensen, 191 Wis. 2d 301, 529 N.W.2d 245 (Ct. App. 1995).
- 2 Yoerg v. Iowa Dairy Industry Commission, 244 Iowa 1377, 60 N.W.2d 566 (1953); Nichols v. Department of Corrections, 1981 OK 83, 631 P.2d 746 (Okla. 1981).
- 3 Office of Hawaiian Affairs v. Housing and Community Development Corp. of Hawaii (HCDCH), 117 Haw. 174, 177 P.3d 884 (2008), rev'd on other grounds and remanded, 556 U.S. 163, 129 S. Ct. 1436, 173 L. Ed. 2d 333 (2009); Texas Dept. of Ins. v. Reconveyance Services, Inc., 306 S.W.3d 256 (Tex. 2010).
As to whether declaratory judgment actions are an exception to immunity, see § 119.
- 4 Ex parte Alabama Dept. of Transp., 978 So. 2d 17 (Ala. 2007); Office of Hawaiian Affairs v. Housing and Community Development Corp. of Hawaii (HCDCH), 117 Haw. 174, 177 P.3d 884 (2008), rev'd on other grounds and remanded, 556 U.S. 163, 129 S. Ct. 1436, 173 L. Ed. 2d 333 (2009); City of El Paso v. Heinrich, 284 S.W.3d 366 (Tex. 2009).
- 5 Bafford v. Nelson, 241 F. Supp. 2d 1192 (D. Kan. 2002).
- 6 Jackson v. New York State, 381 F. Supp. 2d 80 (N.D. N.Y. 2005).

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West's Key Number Digest

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A state may not be controlled by the courts in the performance of its political duties through suits against its officials.¹ Even a suit against an officer, in which it is claimed that the officer has acted unconstitutionally or beyond his or her statutory powers, may fail, as one against the sovereign, if the relief requested cannot be granted by merely ordering the cessation of that conduct but requires an affirmative action by the sovereign or the disposition of unquestionably sovereign property.² However, this rule has been clarified to mean that sovereign immunity is not implicated unless the affirmative act would require that a state official spend public funds.³

A state's immunity does not apply to an action to compel a state officer to perform the officer's clear duty,⁴ such as a duty required of the officer by a statute,⁵ even if a payment of state funds may be compelled.⁶ A suit brought by the person entitled to the performance of a ministerial duty against the official charged with its performance is not a suit against the government and thus not barred by sovereign immunity.⁷

Suits may be maintained against state officials with respect to the performance of their duties in connection with matters concerning which the State does not have a direct governmental interest to preserve.⁸

Footnotes

- 1 Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 64 S. Ct. 873, 88 L. Ed. 1121 (1944).
- 2 Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949).
- 3 Doe v. Bd. of Regents of University of Nebraska, 280 Neb. 492, 788 N.W.2d 264, 259 Ed. Law Rep. 875 (2010).
- 4 Ex parte Craft, 727 So. 2d 55, 133 Ed. Law Rep. 286 (Ala. 1999); Noyola v. Board of Educ. of the City of Chicago, 179 Ill. 2d 121, 227 Ill. Dec. 744, 688 N.E.2d 81, 123 Ed. Law Rep. 310 (1997); State ex rel. Wilson v. Preston, 173 Ohio St. 203, 19 Ohio Op. 2d 11, 181 N.E.2d 31, 3 A.L.R.3d 663 (1962).
- 5 Graham v. Folsom, 200 U.S. 248, 26 S. Ct. 245, 50 L. Ed. 464 (1906); Hampton v. State Board of Education, 90 Fla. 88, 105 So. 323, 42 A.L.R. 1456 (1925); Kittredge v. Boyd, 136 Kan. 691, 18 P.2d 563, 93 A.L.R. 574 (1933); O'Neill v. State Highway Dept., 50 N.J. 307, 235 A.2d 1 (1967).
- 6 In re Lawrence M., 172 Ill. 2d 523, 219 Ill. Dec. 32, 670 N.E.2d 710 (1996).
- 7 Burch v. Moulton, 980 So. 2d 392, 232 Ed. Law Rep. 520 (Ala. 2007); Clowers v. Lassiter, 363 Ark. 241, 213 S.W.3d 6 (2005); Dan Nelson, Automotive, Inc. v. Viken, 2005 SD 109, 706 N.W.2d 239 (S.D. 2005).
- 8 Schippa v. West Virginia Liquor Control Commission, 132 W. Va. 51, 53 S.E.2d 609, 9 A.L.R.2d 1284 (1948).

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West's Key Number Digest

West's Key Number Digest, [States](#) 191.9(1), 191.9(2)

There is authority for the view that sovereign immunity does not apply to suits that simply seek to restrain state officials from performing affirmative acts.¹ However, it has also been held that a suit against the members of a state commission to prevent them from performing their official duties is a suit against the State within the meaning of the doctrine of sovereign immunity.²

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Footnotes

- 1 Doe v. Bd. of Regents of University of Nebraska, 280 Neb. 492, 788 N.W.2d 264, 259 Ed. Law Rep. 875 (2010); Legal Capital, LLC. v. Medical Professional Liability Catastrophe Loss Fund, 561 Pa. 336, 750 A.2d 299 (2000).
- 2 Charlotte-Mecklenburg Hosp. Authority v. North Carolina Indus. Com'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

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West's Key Number Digest

West's Key Number Digest, [States](#) 191.10, 193

A state's sovereign immunity does not protect public officers from personal liability for wrongful acts in excess of¹ or outside the scope of² their authority. Acts of state officials that are not lawfully authorized are not considered acts of the state.³ Under an ultra vires exception to sovereign immunity, the governmental entities themselves, as opposed to their officers in their official capacity, remain immune from suit.⁴ Also, an action to redress injuries caused by a state officer acting under invalid authority or exceeding or abusing one's lawful authority is not a suit against the State and thus not prohibited by sovereign immunity.⁵

CUMULATIVE SUPPLEMENT

Cases:

Under Texas law, former police officer's claim that mayor, acting in his official capacity, violated his rights under statute barring disciplinary action against law enforcement officer in absence of complaint that was signed, delivered, investigated, and supported by evidence fell within scope of ultra vires exception to city's sovereign immunity. [V.T.C.A., Government Code § 614.023. Stem v. Gomez, 813 F.3d 205 \(5th Cir. 2016\).](#)

State Constitution's prohibition of suits against State did not bar claims for injunctive relief in action for breach of contract brought by former state university athletic director against university officials in their official capacities. (Per Bryan, J., with two Justices concurring, two Justices concurring specially, and three Justices concurring in result.) Const. Art. 1, § 14. [Alabama State University v. Danley, 212 So. 3d 112 \(Ala. 2016\)](#).

One of the exceptions to the sovereign immunity defense is that a state agency may be enjoined if it can be shown that the agency's action is ultra vires or outside the authority of the agency. [Key v. Curry, 2015 Ark. 392, 473 S.W.3d 1 \(2015\)](#).

Actions of a state officer undertaken without legal authority strip the officer of his official status under the State Lawsuit Immunity Act; accordingly, pursuant to the Court of Claims Act, when a state officer performs illegally or purports to act under an unconstitutional act or under authority which he does not have, the officer's conduct is not regarded as the conduct of the State. S.H.A. [705 ILCS 505/1 et seq.](#); [745 ILCS 5/0.01 et seq.](#) [Leetaru v. Board of Trustees of University of Illinois, 2015 IL 117485, 392 Ill. Dec. 275, 32 N.E.3d 583 \(Ill. 2015\)](#).

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Footnotes

- 1 Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 64 S. Ct. 873, 88 L. Ed. 1121 (1944); *Ex parte Alabama Dept. of Forensic Sciences*, 709 So. 2d 455 (Ala. 1997); *Gold v. Rowland*, 296 Conn. 186, 994 A.2d 106 (2010); *PHL, Inc. v. Pullman Bank and Trust Co.*, 216 Ill. 2d 250, 296 Ill. Dec. 828, 836 N.E.2d 351 (2005); *Johnson v. Clarke*, 258 Neb. 316, 603 N.W.2d 373 (1999); *Schloss v. State Highway & Public Works Commission*, 230 N.C. 489, 53 S.E.2d 517 (1949); *Dan Nelson, Automotive, Inc. v. Viken*, 2005 SD 109, 706 N.W.2d 239 (S.D. 2005); *Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 121 Ed. Law Rep. 394 (Tex. 1997).
- 2 *Ex parte Dangerfield*, 49 So. 3d 675 (Ala. 2010); *Grine v. Board of Trustees*, 338 Ark. 791, 2 S.W.3d 54, 140 Ed. Law Rep. 410 (1999); *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992); *Texas Parks and Wildlife Dept. v. Sawyer Trust*, 354 S.W.3d 384 (Tex. 2011).
- 3 *Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299, 72 S. Ct. 321, 96 L. Ed. 335 (1952); *Kleban v. Morris*, 363 Mo. 7, 247 S.W.2d 832 (1952).
- 4 *Texas Dept. of Ins. v. Reconveyance Services, Inc.*, 306 S.W.3d 256 (Tex. 2010).
As to the rule that only an officer that acts within the scope of authority is protected from liability, see [Am. Jur. 2d, Public Officers and Employees](#) § 301.
- 5 *Florida State Hospital for the Insane v. Durham Iron Co.*, 194 Ga. 350, 21 S.E.2d 216 (1942); *Schwing v. Miles*, 367 Ill. 436, 11 N.E.2d 944, 113 A.L.R. 1504 (1937); *Doe v. Bd. of Regents of University of Nebraska*, 280 Neb. 492, 788 N.W.2d 264, 259 Ed. Law Rep. 875 (2010); *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009).

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West's Key Number Digest

West's Key Number Digest, [States](#) 191.10, 193

Sovereign immunity may not be invoked by state officials when their actions are attacked as being unconstitutional,¹ including when sued in federal court.² Such an action is not a suit against the State because the threatened action, being unauthorized, would not be that of the sovereign but merely that of the individual occupying the office.³ Similarly, a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the State that would be barred by the 11th Amendment.⁴

CUMULATIVE SUPPLEMENT

Cases:

Award of damages to former state university athletic director against university officials in their individual capacities for their actions of wrongly withdrawing funds from athletic director's personal bank account after funds had been deposited to pay athletic director's salary was not barred by state Constitution's provision that the State may not be made a defendant in any court; award neither affected a contract right of State, nor did it result in recovery of money from State. (Per Bryan, J., with two Justices concurring, two Justices concurring specially, and three Justices concurring in result.) Const. Art. 1, § 14. [Alabama State University v. Danley](#), 212 So. 3d 112 (Ala. 2016).

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Footnotes

- 1 *Kaho'ohanohano v. State*, 114 Haw. 302, 162 P.3d 696 (2007).
- 2 *Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299, 72 S. Ct. 321, 96 L. Ed. 335 (1952).
An officer, who claims to act in the state's name and violates the U.S. Constitution, loses one's official or representative character and consequently 11th Amendment immunity. *Office of Child Advocate v. Lindgren*, 296 F. Supp. 2d 178, 32 A.L.R. Fed. 2d 715 (D.R.I. 2004).
- 3 *Kleban v. Morris*, 363 Mo. 7, 247 S.W.2d 832 (1952); *City of Kenosha v. State*, 35 Wis. 2d 317, 151 N.W.2d 36 (1967).
- 4 *Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299, 72 S. Ct. 321, 96 L. Ed. 335 (1952).

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West's Key Number Digest

West's Key Number Digest, [States](#) 191.9(1), 191.10, 193

The 11th Amendment does not bar suit in federal court against a state official for the purpose of obtaining an injunction against the enforcement of a state law alleged to be unconstitutional.¹ State sovereign immunity also does not mean that suit may not be brought against government officers who are proceeding under an unconstitutional statute.² In such cases, because the defendant is sued, not as or because he or she is an officer of the government but as an individual, the court is not ousted of jurisdiction because the defendant asserts authority as an officer of the state,³ and the suit is not against the State.⁴

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¹ [Ray v. Atlantic Richfield Co.](#), 435 U.S. 151, 98 S. Ct. 988, 55 L. Ed. 2d 179 (1978); [Ex parte Young](#), 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

² [Burch v. Moulton](#), 980 So. 2d 392, 232 Ed. Law Rep. 520 (Ala. 2007); [Gold v. Rowland](#), 296 Conn. 186, 994 A.2d 106 (2010) (noting, conversely, where a substantial claim is not made that the officer is acting pursuant to an unconstitutional enactment or in excess of statutory authority, the action must be dismissed); [Dan Nelson, Automotive, Inc. v. Viken](#), 2005 SD 109, 706 N.W.2d 239 (S.D. 2005).

³ [Georgia Railroad & Banking Co. v. Redwine](#), 342 U.S. 299, 72 S. Ct. 321, 96 L. Ed. 335 (1952); [White Eagle Oil & Refining Co. v. Gunderson](#), 48 S.D. 608, 205 N.W. 614, 43 A.L.R. 397 (1925).

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[Immunity of States in Private Actions for Damages Under Family and Medical Leave Act \(29 U.S.C.A. ss 2601 et seq.\), 180 A.L.R. Fed. 579](#)

Law Reviews and Other Periodicals

Pellicciotti and Pellicciotti, [Sovereign Immunity and Congressionally Authorized Private Party Actions Against the States for Violation of Federal Law: A Consideration of the U.S. Supreme Court's Decade Long Decisional Trek, 1996-2006](#), 59 Baylor L. Rev. 623 (2007)

Sovereign immunity does not exempt a state from a challenge based on a violation of its own constitution, the United States Constitution,¹ or a valid federal law.² However, courts may require that such a complaint clearly demonstrate an incursion on constitutionally protected interests.³

With regard to suits against officers in their official capacity,⁴ a federal court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.⁵ On the other hand, even if Congress had found a pattern of unconstitutional disability discrimination by the states, the states' immunity from suits for money damages was not abrogated by Title I of the Americans with Disabilities Act.⁶

CUMULATIVE SUPPLEMENT

Cases:

The exception to sovereign immunity for illegal or unconstitutional claims applied only to injunctive relief, and thus, did not operate to bar sovereign immunity defense raised by the State Police Retirement System and members of its board of trustees with regard to class action brought by retired police officer alleging legislation that allowed for a drop in the minimum rate of return on retirement accounts was unconstitutional because it deprived retirees of their contractual rights and a vested property right, that the trustees had breached their fiduciary duties, and that the violations were actionable under 42 U.S.C. §§ 1983, where rather than injunctive relief, the retired officers sought money damages. U.S. Const. art. 1, § 10, cl. 4; 42 U.S.C.A. § 1983; Ark. Const. art. 5, § 20; Ark. Code Ann. § 24-6-301, et seq. Arkansas State Police Retirement System v. Sligh, 2017 Ark. 109, 516 S.W.3d 241 (2017).

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Footnotes

1 Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994), as clarified, (Nov. 30, 1994).

2 Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999).

3 Columbia Air Services, Inc. v. Department of Transp., 293 Conn. 342, 977 A.2d 636 (2009).

4 § 111.

5 Verizon Maryland, Inc. v. Public Service Com'n of Maryland, 535 U.S. 635, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002).

6 Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866, 151 Ed. Law Rep. 35 (2001).

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A state's sovereign immunity does not bar certain actions against a state, its officers, or agencies for injunctive or declaratory relief.¹ On the other hand, a state may follow the rule that it is generally immune from suits in equity to restrain or compel governmental action unless the claim is based on self-executing provisions of the state constitution or on federal law.² Sovereign immunity may bar a declaratory judgment proceeding, where the legislature has not abolished immunity over the claim,³ such as where a state had not consented to be sued for the equitable claims raised.⁴ A declaratory judgment act does not necessarily waive a state's immunity unless the legislature has waived immunity for the particular claims at issue.⁵ Also, the rule excepting declaratory judgment actions from immunity does not apply where a declaratory judgment was not the sole relief sought,⁶ the plaintiff sought a declaration that its rights were violated so that it could pursue a damage remedy against the State,⁷ the declaratory judgment action was brought to enforce a contract,⁸ or there is nothing to be "declared" under a declaratory judgment count that did not fall under counts seeking damages.⁹ Conversely, injunctive relief is not precluded by sovereign immunity in a declaratory judgment action if such relief would not require that state officials spend public funds.¹⁰

The 11th Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law.¹¹ Under a particular state constitution, sovereign immunity does not apply to declaratory judgment actions against officers named in their official capacity, but state agencies may not be named as defendants in the action.¹²

CUMULATIVE SUPPLEMENT

Cases:

Under *Ex Parte Young*, a private party can sue a state officer in his or her official capacity to enjoin prospective action that would violate federal law. [Miller v. Smith, 952 F. Supp. 2d 275 \(D.D.C. 2013\)](#).

Sovereign immunity did not preclude injunctive relief for landowners who had brought action against Game and Fish Commission over access to a road that was owned by the Commission and that was allegedly the only way for landowners to access their property; landowners did not seek to control the manner in which the road was used or maintained, but rather sought to enjoin only the allegedly illegal actions of Commission in blocking their access to the property. [Ark. Const. art. 5, § 20. Arkansas Game and Fish Commission v. Heslep, 2019 Ark. 226, 577 S.W.3d 1 \(2019\)](#).

A litigant's couching of its requested relief in terms of declaratory relief does not alter the underlying nature of the suit such that a Uniform Declaratory Judgments Act (UDJA) claim that might otherwise be within a court's jurisdiction will be independently barred by sovereign immunity if it has the effect of establishing a right to relief against a governmental entity for which the Legislature has not waived immunity. [V.T.C.A., Civil Practice & Remedies Code § 37.004\(a\). Texas Dept. of State Health Services v. Balquinta, 429 S.W.3d 726 \(Tex. App. Austin 2014\)](#), petition for review filed, (June 26, 2014).

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1 [Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 \(1999\); Ex parte Dangerfield, 49 So. 3d 675 \(Ala. 2010\)](#) (seeking construction of statute); [Latham v. Department of Corrections, 927 So. 2d 815 \(Ala. 2005\)](#); [State, Dept. of Health and Social Services, Div. of Family and Youth Services v. Native Village of Curyung, 151 P.3d 388 \(Alaska 2006\)](#); [DaimlerChrysler Corp. v. Law, 284 Conn. 701, 937 A.2d 675 \(2007\)](#); [Pele Defense Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 \(1992\)](#); [Clay v. Weber, 2007 SD 45, 733 N.W.2d 278 \(S.D. 2007\)](#); [Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827 \(Tenn. 2008\)](#); [Town of Flower Mound v. Rembert Enterprises, Inc., 2012 WL 662455 \(Tex. App. Fort Worth 2012\)](#).

If a plaintiff succeeds in establishing that the state and state officials acted illegally, they do not have sovereign immunity in an action for injunctive relief regardless whether that relief can be crafted so as to minimize interference with government functions. [Markley v. Department of Public Utility Control, 301 Conn. 56, 23 A.3d 668 \(2011\)](#).

Since immunity was not waived, the sole remedy under a constitutional amendment limiting expenditures is a declaratory judgment. [Committee for Educational Equality v. State, 294 S.W.3d 477, 249 Ed. Law Rep. 926 \(Mo. 2009\)](#).

As to declaratory judgments against states, see [Am. Jur. 2d, Declaratory Judgments § 213](#).

2 [DiGiacinto v. Rector and Visitors of George Mason University, 281 Va. 127, 704 S.E.2d 365, 263 Ed. Law Rep. 966 \(2011\)](#).

3 [Gray v. Virginia Secretary of Trans., 276 Va. 93, 662 S.E.2d 66 \(2008\)](#).

4 [Lorenz v. New Hampshire Administrative Office of the Courts, 152 N.H. 632, 883 A.2d 265 \(2005\)](#), as modified, (Feb. 16, 2006).

5 [Texas Dept. of Transp. v. Sefzik, 355 S.W.3d 618 \(Tex. 2011\)](#) (but noting that it does waive immunity with regard to declaration of the invalidity of a statute by requiring that the state be joined).

6 [State ex rel. Sawicki v. Court of Common Pleas of Lucas Cty., 121 Ohio St. 3d 507, 2009-Ohio-1523, 905 N.E.2d 1192 \(2009\)](#).

7 [PRN Associates LLC v. State, Dept. of Admin., 2009 WI 53, 317 Wis. 2d 656, 766 N.W.2d 559 \(2009\)](#).

8 Town of Flower Mound v. Rembert Enterprises, Inc., 2012 WL 662455 (Tex. App. Fort Worth 2012).
9 Ex parte Dangerfield, 49 So. 3d 675 (Ala. 2010).
10 Project Extra Mile v. Nebraska Liquor Control Com'n, 283 Neb. 379, 810 N.W.2d 149 (2012).
11 Frew ex rel. Frew v. Hawkins, 540 U.S. 431, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004).
12 Alabama Dept. of Transp. v. Harbert Intern., Inc., 990 So. 2d 831 (Ala. 2008).

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(4) Immunity with Regard to Particular Types of Actions or Claims

§ 120. Actions involving title to or possession of property

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West's Key Number Digest

West's Key Number Digest, [States](#) 191.9(5)

A suit that involves a contract or property right of the state with reference to property owned and held by the state is in legal effect a suit against the State, even if it is brought against state officers or a state agency, and may not be maintained if it affects property rights of the state or seeks to enforce a contract made by or for the State unless the State has consented.¹ However, a suit for recovery of possession of property from an individual assertedly holding it as a state officer is not an action against the state.² One reason for this rule is that a judgment against the officer is not conclusive on the right or title of the sovereign to such property.³ Furthermore, an officer who seizes private property by virtue of the provisions of an unconstitutional statute ceases to be an officer of the law and becomes a private wrongdoer and is therefore amenable to an action for recovery of possession of the property.⁴

CUMULATIVE SUPPLEMENT

Cases:

When suit for recovery of title to and possession of land, filed without legislative consent, is not against the state itself, but is against state officials only, the mere assertion by pleading that the defendants claim title or right of possession as officials of the state and on behalf of the state will not bar prosecution of the suit based on sovereign immunity. [Parker v. Hunegnaw](#), 364 S.W.3d 398 (Tex. App. Houston 14th Dist. 2012).

[END OF SUPPLEMENT]

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Footnotes

- 1 Landsn Pulaski, LLC v. Arkansas Dept. of Corrections, 372 Ark. 40, 269 S.W.3d 793 (2007); First Union Nat. Bank v. Hi Ho Mall Shopping Ventures, Inc., 273 Conn. 287, 869 A.2d 1193 (2005) (sovereign immunity not waived so as to permit foreclosure of state-owned real property); Hampton v. State Board of Education, 90 Fla. 88, 105 So. 323, 42 A.L.R. 1456 (1925); New 52 Project, Inc. v. Proctor, 122 Ohio St. 3d 1, 2009-Ohio-1766, 907 N.E.2d 305 (2009) (action to quiet title does not lie against state); Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479 (Tex. 2011) (declaratory judgment actions barred since the claims involved a determination of a state agency's real property interests).
- 2 Pauchogue Land Corporation v. Long Island State Park Commission, 243 N.Y. 15, 152 N.E. 451 (1926); Imperial Sugar Co. v. Cabell, 179 S.W. 83 (Tex. Civ. App. Galveston 1915).
- 3 Pauchogue Land Corporation v. Long Island State Park Commission, 243 N.Y. 15, 152 N.E. 451 (1926).
- 4 Stockton v. Morris & Pierce, 172 Tenn. 197, 110 S.W.2d 480 (1937).

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West's Key Number Digest

West's Key Number Digest, [States](#)  191.2(1), 191.8(1)

A state's sovereign immunity bars suits against it only in the absence of consent.¹ A State may voluntarily waive sovereign immunity.²

A State may not be sued without a constitutional provision allowing a suit or the express consent of the legislature.³ The decision to waive immunity, and to what extent it is waived, are within the state legislature's purview,⁴ and, generally speaking, only the legislature has the authority to do so.⁵ However, a legislature's delegation to a claims commissioner broad authority to waive the State's sovereign immunity from suit where "just and equitable" was authorized under a constitutional provision that claims against the State shall be resolved in such manner as may be provided by law.⁶ A State may also waive its immunity in certain respects by entering into an interstate compact.⁷

One state does not have the power to waive the sovereign immunity of another state.⁸

CUMULATIVE SUPPLEMENT

Cases:

RLUIPA's use of the phrase "appropriate relief," in stating that a person asserting a violation of the statute "as a claim or defense in a judicial proceeding" may "obtain appropriate relief against a government," is not an unequivocal expression of consent by state as recipient of federal funding to private suits for monetary damages and therefore does not operate to effect a waiver of the states' sovereign immunity from such suits. Religious Land Use and Institutionalized Persons Act of 2000, § 4(a), 42 U.S.C.A. § 2000cc-2(a). *Jones v. Williams*, 791 F.3d 1023 (9th Cir. 2015).

Under Georgia law, sovereign immunity is not affirmative defense that must be established by party seeking its protection; to contrary, immunity from suit is privilege that is subject to waiver by state, and that waiver must be established by party seeking to benefit from waiver. *Kemeness v. Worth County, Georgia*, 449 F. Supp. 3d 1318 (M.D. Ga. 2020).

In the absence of a waiver, sovereign immunity bars all suits against the state, regardless of the relief sought. *Anthony K. v. State*, 289 Neb. 523, 855 N.W.2d 802 (2014).

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Footnotes

- 1 *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999).
- 2 *Lake View School Dist. No. 25 of Phillips County v. Huckabee*, 340 Ark. 481, 10 S.W.3d 892, 141 Ed. Law Rep. 1183 (2000); *Department of Public Works v. ECAP Const. Co.*, 250 Conn. 553, 737 A.2d 398 (1999); *ARA Health Services, Inc. v. Department of Public Safety and Correctional Services*, 344 Md. 85, 685 A.2d 435 (1996); *In re Interest of Krystal P.*, 251 Neb. 320, 557 N.W.2d 26 (1996); *Wilson v. Hogan*, 473 N.W.2d 492 (S.D. 1991); *Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 121 Ed. Law Rep. 394 (Tex. 1997).
As to waiver of a state's immunity in tort cases, see *Am. Jur. 2d, Municipal, County, School, and State Tort Liability* §§ 32 et seq.
- 3 *F.D.I.C. v. Peabody, N.E., Inc.*, 239 Conn. 93, 680 A.2d 1321 (1996); *Collins v. Commonwealth of Ky. Natural Resources and Environmental Protection Cabinet*, 10 S.W.3d 122 (Ky. 1999); *Magnetti v. University of Maryland*, 402 Md. 548, 937 A.2d 219, 228 Ed. Law Rep. 327 (2007); *Locator Services Group, Ltd. v. Treasurer and Receiver General*, 443 Mass. 837, 825 N.E.2d 78 (2005); *Anzaldua v. Band*, 457 Mich. 530, 578 N.W.2d 306, 126 Ed. Law Rep. 379 (1998); *Allen v. Fauver*, 167 N.J. 69, 768 A.2d 1055 (2001); *McMurphy v. State*, 171 Vt. 9, 757 A.2d 1043 (2000); *Gray v. Virginia Secretary of Trans.*, 276 Va. 93, 662 S.E.2d 66 (2008); *German v. Wisconsin Dept. of Transp.*, Div. of State Patrol, 2000 WI 62, 235 Wis. 2d 576, 612 N.W.2d 50 (2000).
As to the effect of constitutional provisions, see § 122.
- 4 *Murray v. Missouri Highway and Transp. Com'n*, 37 S.W.3d 228 (Mo. 2001); *State v. Thompson*, 197 S.W.3d 685 (Tenn. 2006); *Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 121 Ed. Law Rep. 394 (Tex. 1997); *Alewine v. State, Dept. of Health and Social Services, Div. of Public Assistance and Social Services*, 803 P.2d 1372 (Wyo. 1991).
As to conditional waivers, see § 127.
- 5 *American Home Assur. Co. v. National Railroad Passenger Corp.*, 908 So. 2d 459 (Fla. 2005); *Ligon v. County of Goochland*, 279 Va. 312, 689 S.E.2d 666 (2010) (with regard to a particular type of legal action).
- 6 *State v. Charlotte Hungerford Hosp.*, 133 Conn. App. 479, 36 A.3d 252 (2012).
- 7 *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 79 S. Ct. 785, 3 L. Ed. 2d 804 (1959).
- 8 *Athay v. Stacey*, 146 Idaho 407, 196 P.3d 325 (2008).

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§ 122. Effect of state constitutional provisions

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West's Key Number Digest

West's Key Number Digest, [States](#) 191.2(1)

Consent to be sued may be given or expressly authorized by the state constitution.¹ Some constitutional provisions are self-executing and thus constitute a waiver of sovereign immunity.² However, a state constitutional provision that suit may be brought against the state in the manner provided by law is not self-executing, so a state with this type of provision may not be sued in the absence of enabling legislation.³ Under other state constitutions, the legislature retains the power to modify the common-law doctrine of sovereign immunity,⁴ or the State may consent to be sued on such terms and conditions as the legislature may prescribe.⁵

If a state constitution contains a prohibition against making the State a defendant to a suit, none of the branches of the government may waive it.⁶ This prohibition against suits may not be circumvented by establishing a board and allowing it to be sued for the state's contracts or other liabilities if the effect is to assert a claim against the state's resources.⁷

Where the doctrine of sovereign immunity is implicit in the state constitution, a court may not abolish it; instead, the doctrine may only be waived or altered by the legislature pursuant to a general law.⁸

Constitutional provisions that no money shall be drawn from the state treasury except in pursuance of appropriations made by law and that the general assembly may by law direct in what manner and in what courts suits may be brought against the state

permit the legislature to waive inherent immunity, either by direct appropriations or specifying where and in what manner the State may be sued.⁹

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Footnotes

- 1 Fullilove v. U. S. Cas. Co. of N. Y., 129 So. 2d 816 (La. Ct. App. 2d Cir. 1961).
- 2 Gray v. Virginia Secretary of Trans., 276 Va. 93, 662 S.E.2d 66 (2008).
- 3 Shellhorn & Hill, Inc. v. State, 55 Del. 298, 187 A.2d 71 (1962); Livengood v. Nebraska State Patrol Retirement System, 273 Neb. 247, 729 N.W.2d 55 (2007); Fahnbuehl v. Strahan, 73 Ohio St. 3d 666, 1995-Ohio-295, 653 N.E.2d 1186 (1995); Worthington v. State, 598 P.2d 796 (Wyo. 1979).
- 4 City Of Phoenix v. Fields, 219 Ariz. 568, 201 P.3d 529 (2009).
- 5 Livengood v. Nebraska State Patrol Retirement System, 273 Neb. 247, 729 N.W.2d 55 (2007).
- 6 Atkinson v. State, 986 So. 2d 408 (Ala. 2007); University of West Virginia Bd. of Trustees ex rel. West Virginia University v. Graf, 205 W. Va. 118, 516 S.E.2d 741, 136 Ed. Law Rep. 591 (1998).
- 7 Curry v. Woodstock Slag Corporation, 242 Ala. 379, 6 So. 2d 479 (1942).
- 8 Clarke v. Oregon Health Sciences University, 343 Or. 581, 175 P.3d 418 (2007).
- 9 Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc., 286 S.W.3d 790 (Ky. 2009).

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§ 123. Consent to suit authorized by statute or resolution

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West's Key Number Digest

West's Key Number Digest, [States](#) 191.3, 191.6(2), 191.6(3)

A State may consent to be sued through a statute or by a legislative resolution.¹ Consent to suit generally must be expressed by the terms of a statute, or appear by necessary implication from those terms,² although it has also been held that it must be explicit, not implicit.³ A waiver of sovereign or governmental immunity from suit generally requires that the legislature authorize suits for damages and make provision for the payment of judgments.⁴ A statute's silence regarding damages indicates the absence of a waiver of immunity from suits for damages.⁵

A state legislature has the power, even after an action has been filed and verdict rendered against a state agency, to authorize that specific action.⁶

CUMULATIVE SUPPLEMENT

Cases:

State constitutional provision permitting waiver of sovereign immunity permits the State to lay its sovereignty aside and consent to be sued on such terms and conditions as the legislature may prescribe. West's Neb.Rev.St. Const. Art. 5, § 22. [Zawaideh v. Nebraska Dept. of Health and Human Services Regulation and Licensure](#), 285 Neb. 48, 825 N.W.2d 204 (2013).

Principle of statutory construction, that statutes in derogation of sovereignty should be construed strictly in favor of the sovereign, continues to apply in context of statutes enacted after abrogation of common-law sovereign immunity, including Contractor and Subcontractor Payment Act (CASPA), in light of subsequent enactment of statute reaffirming and reinstating doctrine of sovereign immunity. [1 Pa.C.S.A. § 2310](#); 73 P.S. § 501 et seq. [Clipper Pipe & Service, Inc. v. Ohio Cas. Ins. Co., 115 A.3d 1278 \(Pa. 2015\)](#).

States may be sued with their express consent in accordance with statutory enactments. [Goldman v. Southeastern Pennsylvania Transp. Authority, 57 A.3d 1154 \(Pa. 2012\)](#).

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Footnotes

- 1 [Federal Sign v. Texas Southern University, 951 S.W.2d 401, 121 Ed. Law Rep. 394 \(Tex. 1997\)](#).
As to statutory abrogation or waiver of immunity to suit in tort cases, see [Am. Jur. 2d, Municipal, County, School, and State Tort Liability §§ 32 et seq.](#)
- 2 [Brooks ex rel. Wright v. Housing Authority of Baltimore City, 411 Md. 603, 984 A.2d 836 \(2009\); Locator Services Group, Ltd. v. Treasurer and Receiver General, 443 Mass. 837, 825 N.E.2d 78 \(2005\); Chase Home for Children v. New Hampshire Div. for Children, Youth and Families, 162 N.H. 720, 34 A.3d 1195 \(2011\)](#).
A litigant who seeks to overcome the presumption of sovereign immunity as a result of a statutory waiver must show that the legislature, either expressly or by force of a necessary implication, waived the state's sovereign immunity. [Housatonic R. Co., Inc. v. Commissioner of Revenue Services, 301 Conn. 268, 21 A.3d 759 \(2011\)](#).
- 3 [Janowski v. Division of State Police, Dept. of Safety and Homeland Sec., State, 981 A.2d 1166 \(Del. 2009\); Grant Const. Co. v. Burns, 92 Idaho 408, 443 P.2d 1005 \(1968\); Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827 \(Tenn. 2008\)](#).
A waiver of sovereign immunity may not be implied from general statutory language but must be explicitly and expressly stated in the statute. [Doud v. Com., 282 Va. 317, 717 S.E.2d 124 \(2011\)](#).
- 4 [Brooks ex rel. Wright v. Housing Authority of Baltimore City, 411 Md. 603, 984 A.2d 836 \(2009\)](#).
- 5 [Knowlton v. Attorney General, 2009 ME 79, 976 A.2d 973 \(Me. 2009\)](#).
- 6 [Long v. Northeast Soil Conservation Dist. of La., 226 La. 824, 77 So. 2d 408 \(1954\)](#).

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§ 124. Construction and effect of waiver provisions

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West's Key Number Digest

West's Key Number Digest, States  191.6(1), 191.7, 191.8

A statutory waiver of immunity must be expressed in clear and unequivocal, unmistakable, or unambiguous language,¹ and a state's immunity to suit is not diminished by statute unless a clear legislative intention to that effect is disclosed.² A waiver of immunity will not be lightly inferred³ but must be based on specific statutory language with regard to the existence and extent of the waiver,⁴ or the most express language or such overwhelming implication from the text as to leave no room for any other reasonable construction.⁵ The waiver must be the only possible interpretation of the statute.⁶ When a statute is susceptible of multiple plausible interpretations, including one preserving sovereign immunity, a court will not consider that a State has waived its immunity.⁷ Thus, a statute of general application, not containing a specific provision that the State is within it, does not give consent to suit against the State.⁸ It has also been said that when deciding whether the legislature intended to waive sovereign immunity, one factor to consider is whether the provisions of the statute would serve any purpose absent a waiver of immunity.⁹

Statutes waiving the state's immunity from suit, being in derogation of sovereignty, generally are strictly construed.¹⁰ However, it has also been held that statutory waivers should be liberally construed in cases involving independent authorities.¹¹

CUMULATIVE SUPPLEMENT

Cases:

Where a legislative act creates a right of action against the state which can result in a money judgment against the state treasury, and the state otherwise would have enjoyed sovereign immunity from the cause of action, the legislative act must be considered a waiver of the state's sovereign immunity to the extent of the right of action—or the legislative act would have no meaning. [Fulton County v. Colon, 730 S.E.2d 599 \(Ga. Ct. App. 2012\)](#).

Statute that imposes a statutory duty on the Secretary of the Executive Office of Health and Human Services to set payment rates for hospitals with a disproportionate share of economically poor patients that equal the financial requirements of providing care to those patients does not expressly waive sovereign immunity and create a private right of action for a hospital to claim that the Secretary breached this duty by imposing unreasonably low payment rates in the Request for Applications (RFA) that informs each hospital of the payment rates for each Medicaid-eligible patient that the hospital may treat, as well as the methodology used to calculate each hospital's payment rates. [M.G.L.A. c. 118G, § 11\(a\). Boston Medical Center Corp. v. Secretary of Executive Office of Health and Human Services, 463 Mass. 447, 974 N.E.2d 1114 \(2012\)](#).

Sovereign immunity from liability created by statute is waived only if the statute demonstrates the Legislature's express intent to allow suit against the State. M.S.A. § 645.27. [Nichols v. State, 858 N.W.2d 773 \(Minn. 2015\)](#).

Term "statutory prerequisite" refers to statutory provisions that are mandatory and must be accomplished prior to filing suit, as that term is used in statute providing that a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language and requiring compliance with statutory prerequisites to suit against a governmental entity. [V.T.C.A., Government Code § 311.034. Dallas County Southwestern Institute of Forensic Sciences & Medical Examiner Dept. v. Ray, 400 S.W.3d 219 \(Tex. App. Dallas 2013\)](#).

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Footnotes

- 1 Rivers v. City of New Britain, 288 Conn. 1, 950 A.2d 1247 (2008); [American Home Assur. Co. v. National Railroad Passenger Corp., 908 So. 2d 459 \(Fla. 2005\)](#) (also stating that waiver will not be found as a result of inference or implication); [Kalima v. State, 111 Haw. 84, 137 P.3d 990 \(2006\)](#); [Mullins v. State, 320 S.W.3d 273 \(Tenn. 2010\)](#); [In re Smith, 333 S.W.3d 582 \(Tex. 2011\)](#).
- 2 Murphy v. Ives, 151 Conn. 259, 196 A.2d 596 (1963); [Withers v. University of Kentucky, 939 S.W.2d 340, 116 Ed. Law Rep. 1257 \(Ky. 1997\)](#); [International Depository, Inc. v. State, 603 A.2d 1119 \(R.I. 1992\)](#).
- 3 Meyer v. Walls, 347 N.C. 97, 489 S.E.2d 880 (1997).
- 4 Currid v. DeKalb State Court Probation Dept., 285 Ga. 184, 674 S.E.2d 894 (2009).
- 5 Madison County Fiscal Court v. Kentucky Labor Cabinet, 352 S.W.3d 572 (Ky. 2011); [Britton v. City of Crawford, 282 Neb. 374, 803 N.W.2d 508 \(2011\)](#).
Absent statutory language that indicates by express terms a waiver of sovereign immunity, the legislature's intent to subject the state to liability may be found only when such an intent is clear by necessary implication from the statute's terms. [DeRoche v. Massachusetts Com'n Against Discrimination, 447 Mass. 1, 848 N.E.2d 1197 \(2006\)](#).
- 6 Envirotest Systems Corp. v. Commissioner of Motor Vehicles, 293 Conn. 382, 978 A.2d 49 (2009).
- 7 Sossamon v. Texas, 131 S. Ct. 1651, 179 L. Ed. 2d 700 (2011); [Harris County Hosp. Dist. v. Tomball Regional Hosp., 283 S.W.3d 838 \(Tex. 2009\)](#) (ambiguity resolved in favor of retaining immunity).
- 8 [City of Kenosha v. State, 35 Wis. 2d 317, 151 N.W.2d 36 \(1967\)](#) (declaratory judgment statute).
A statute under which a municipality may adopt an ordinance with regard to an abutting owner's duty to clear the sidewalks does not constitute a waiver of the state's sovereign immunity when the state is the abutting landowner. [Rivers v. City of New Britain, 288 Conn. 1, 950 A.2d 1247 \(2008\)](#).

- 9 Harris County Hosp. Dist. v. Tomball Regional Hosp., 283 S.W.3d 838 (Tex. 2009).
- 10 Sossamon v. Texas, 131 S. Ct. 1651, 179 L. Ed. 2d 700 (2011); Babes v. Bennett, 247 Conn. 256, 721 A.2d 511 (1998); Janowski v. Division of State Police, Dept. of Safety and Homeland Sec., State, 981 A.2d 1166 (Del. 2009); Kalima v. State, 111 Haw. 84, 137 P.3d 990 (2006); Knowlton v. Attorney General, 2009 ME 79, 976 A.2d 973 (Me. 2009); Proctor v. Washington Metropolitan Area Transit Authority, 412 Md. 691, 990 A.2d 1048, 69 A.L.R.6th 747 (2010); McNeill Trucking Co., Inc. v. Missouri State Highway and Transp. Com'n, 35 S.W.3d 846 (Mo. 2001); King v. State, 260 Neb. 14, 614 N.W.2d 341 (2000); Chase Home for Children v. New Hampshire Div. for Children, Youth and Families, 162 N.H. 720, 34 A.3d 1195 (2011); Bello v. Roswell Park Cancer Institute, 5 N.Y.3d 170, 800 N.Y.S.2d 109, 833 N.E.2d 252 (2005); Meyer v. Walls, 347 N.C. 97, 489 S.E.2d 880 (1997); Dean v. Com., Dept. of Transp., 561 Pa. 503, 751 A.2d 1130 (2000); Reagan Const. Corp. v. Mayer, 712 A.2d 372 (R.I. 1998); Powder River Basin Resource Council v. Wyoming Environmental Quality Council, 869 P.2d 435 (Wyo. 1994).
Congress must make its intention to abrogate state sovereign immunity unmistakably clear in the language of the statute. *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012).
- 11 Taylor v. New Jersey Highway Authority, 22 N.J. 454, 126 A.2d 313, 62 A.L.R.2d 1211 (1956).

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§ 125. Consent or waiver with regard to suit in particular forum

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West's Key Number Digest

West's Key Number Digest, [States](#)  191.2(1), 191.4(4)

A state may limit its waiver of immunity to actions brought in its own courts or even as to particular state courts.¹ For instance, a state may consent to be sued in its court of claims² or require that claims be filed with a state claims commissioner³ or commission.⁴

CUMULATIVE SUPPLEMENT

Cases:

Court of Claims has jurisdiction to render judgment only as to those complaints which, prior to the enactment of the Court of Claims Act, were precluded by state immunity; thus, where the state has previously consented to be sued, the Court of Claims lacks jurisdiction. R.C. § 2743.02(A)(1). [Columbus Green Bldg. Forum v. State](#), 2012-Ohio-4244, 980 N.E.2d 1 (Ohio Ct. App. 10th Dist. Franklin County 2012).

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Footnotes

- 1 McDonald v. State of Ill., 557 F.2d 596 (7th Cir. 1977).
- 2 State ex rel. Sawicki v. Court of Common Pleas of Lucas Cty., 121 Ohio St. 3d 507, 2009-Ohio-1523, 905 N.E.2d 1192 (2009).
- 3 184 Windsor Ave., LLC v. State, 274 Conn. 302, 875 A.2d 498 (2005) (review by claims commissioner assures due process in contract disputes).
- 4 Mullins v. State, 320 S.W.3d 273 (Tenn. 2010).

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West's Key Number Digest

West's Key Number Digest, [Federal Courts](#) 266 to 267

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[Permissibility of award of damages, or suit in federal court to enforce such award, against state agency under Randolph-Sheppard Vending Stand Act \(20 U.S.C.A. secs. 107 et seq.\)](#), 117 A.L.R. Fed. 503

Law Reviews and Other Periodicals

[Menashi, Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity](#), 84 Notre Dame L. Rev. 1135 (2009)

It is inherent in the nature of sovereignty that a state is not amenable to suit in federal court by an individual without its consent,¹ but a state's immunity under the 11th Amendment may be waived.² In this regard, a state will be deemed to have waived its

sovereign immunity if the State has expressly consented to the suit, a state statute or the state constitution so provides, or Congress clearly intends to condition the state's participation in a program or activity on the state's waiver of its immunity.³ Thus, a state may knowingly waive its 11th Amendment immunity by voluntarily participating in a federal program⁴ or accepting a congressional grant of authority.⁵ A state's consent to suit pursuant to a federal statute may only result from a clearly expressed consent in the statute's text to ensure that Congress has specifically considered state sovereign immunity and has intentionally legislated on the matter.⁶

By their adoption of the United States Constitution, the states have consented to be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on that court.⁷

A state's consent to suit in its own courts is not a waiver of its immunity from suit in federal court.⁸ Thus, a federal court does not have jurisdiction if the applicable statute indicates that consent is limited to a state court action.⁹ Furthermore, a state's consent to be sued "in any court of competent jurisdiction" will not necessarily be construed as consent to be sued in federal court.¹⁰ On the other hand, a state, which had statutorily waived its immunity from a state law suit in state court, also waived its 11th Amendment immunity on those claims when it voluntarily removed the case to federal court.¹¹

Where the highest court of a state has construed a state statute as intending to waive the state's sovereign immunity to suit in federal court, the state's intent is just as clear as if the waiver were made explicit in the statute.¹²

The supplemental jurisdiction statute¹³ does not authorize federal district courts to exercise jurisdiction over state law claims against nonconsenting states.¹⁴

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Footnotes

1 *Sossamon v. Texas*, 131 S. Ct. 1651, 179 L. Ed. 2d 700 (2011).

2 *Sossamon v. Texas*, 131 S. Ct. 1651, 179 L. Ed. 2d 700 (2011); Virginia Office for Protection and Advocacy v. Stewart, 131 S. Ct. 1632, 179 L. Ed. 2d 675 (2011); Wisconsin Dept. of Corrections v. Schacht, 524 U.S. 381, 118 S. Ct. 2047, 141 L. Ed. 2d 364 (1998); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997); Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 64 S. Ct. 873, 88 L. Ed. 1121 (1944).

3 *Premo v. Martin*, 119 F.3d 764 (9th Cir. 1997).

As to waiver by engaging in litigation, see § 128.

4 *Papasan v. Allain*, 478 U.S. 265, 106 S. Ct. 2932, 92 L. Ed. 2d 209, 32 Ed. Law Rep. 1197 (1986); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985); *Pace v. Bogalusa City School Bd.*, 403 F.3d 272, 196 Ed. Law Rep. 791 (5th Cir. 2005) (noting the validity of conditions that Congress may impose); *Jim C. v. U.S.*, 235 F.3d 1079, 150 Ed. Law Rep. 34 (8th Cir. 2000) (abrogation of 11th Amendment immunity from suit under Rehabilitation Act valid).

5 *MCI Telecommunication Corp. v. Bell Atlantic Pennsylvania*, 271 F.3d 491 (3d Cir. 2001).

6 *Sossamon v. Texas*, 131 S. Ct. 1651, 179 L. Ed. 2d 700 (2011) (waiver not clearly expressed with regard to the Religious Land Use and Institutionalized Persons Act of 2000).

7 *Principality of Monaco v. State of Mississippi*, 292 U.S. 313, 54 S. Ct. 745, 78 L. Ed. 1282 (1934).

As to the original jurisdiction of the Supreme Court in a case in which a state is a party, generally, see *Am. Jur. 2d, Federal Courts* §§ 482 et seq.

8 *Sossamon v. Texas*, 131 S. Ct. 1651, 179 L. Ed. 2d 700 (2011); *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 79 S. Ct. 785, 3 L. Ed. 2d 804 (1959); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 64 S. Ct. 873, 88 L. Ed. 1121 (1944).

- 9 College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 119 S. Ct. 2219, 144
L. Ed. 2d 605, 135 Ed. Law Rep. 362 (1999).
- 10 College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 119 S. Ct. 2219, 144
L. Ed. 2d 605, 135 Ed. Law Rep. 362 (1999); Kennebunk Copper Corp. v. State Tax Com'n, 327 U.S. 573,
66 S. Ct. 745, 90 L. Ed. 862 (1946).
- 11 Lapides v. Board of Regents of University System of Georgia, 535 U.S. 613, 122 S. Ct. 1640, 152 L. Ed.
2d 806, 164 Ed. Law Rep. 566 (2002).
- 12 Redondo Const. Corp. v. Puerto Rico Highway and Transp. Authority, 357 F.3d 124 (1st Cir. 2004).
- 13 28 U.S.C.A. § 1367, discussed in Am. Jur. 2d, Federal Courts §§ 600 et seq.
- 14 Raygor v. Regents of University of Minnesota, 534 U.S. 533, 122 S. Ct. 999, 152 L. Ed. 2d 27 (2002).

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72 Am. Jur. 2d States, Etc. § 127

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States, Territories, and Dependencies

Jack K. Levin, J.D.

I. States

K. Actions and Liability

2. Liability of and Actions Against States

b. Sovereign Immunity

(5) Waiver of Immunity or Consent to Be Sued

§ 127. Limited or conditional consent

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West's Key Number Digest

West's Key Number Digest, [States](#) 191.2(2)

Law Reviews and Other Periodicals

[Volosov, Too Much Time, Too Little Power: Waivers of Sovereign Immunity and Their Statutes of Limitations](#), 38 [Pub. Cont. L.J.](#) 761 (2009)

If a State gives statutory consent to be sued, it may prescribe such conditions as it sees fit, subject to any limitation or restriction in this regard in its own constitution.¹ The legislature may direct the manner in which suits may be brought against the State,² and couple with consent to be sued a condition that the suit be brought in one of its own courts,³ limit the right to sue to certain specified causes,⁴ limit the amount of recovery,⁵ or exclude trial by jury.⁶

If a State does put conditions on its waiver of sovereign immunity, it may be sued only in the manner and on the terms and conditions prescribed.⁷ Compliance with the conditions and restrictions in a statute allowing suits against a state is a jurisdictional prerequisite.⁸

CUMULATIVE SUPPLEMENT

Cases:

The state is permitted to lay its sovereignty aside and consent to be sued on such terms and conditions as the legislature may prescribe. [Neb. Const. art. 5, § 22. Anthony K. v. State, 289 Neb. 523, 855 N.W.2d 802 \(2014\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 Com. v. McCoun, 313 S.W.2d 585 (Ky. 1958); [Insurance Co. of State of Pa. v. Director of Revenue and Director of Ins., 269 S.W.3d 32 \(Mo. 2008\)](#); [Alliance Co. v. State Hospital at Butner, 241 N.C. 329, 85 S.E.2d 386 \(1955\)](#).
The State has waived its sovereign immunity from suits on contract and for personal injury, but the legislature is empowered to limit that waiver and provide for the extent and type of liability that the State faces. [Fulmer v. State, Dept. of Wildlife and Fisheries, 68 So. 3d 499 \(La. 2011\)](#), cert. denied, 132 S. Ct. 1622 (2012).
- 2 PRN Associates LLC v. State, Dept. of Admin., 2009 WI 53, 317 Wis. 2d 656, 766 N.W.2d 559 (2009).
- 3 § 126.
- 4 Smith v. Reeves, 178 U.S. 436, 20 S. Ct. 919, 44 L. Ed. 1140 (1900); [State v. Miser, 50 Ariz. 244, 72 P.2d 408 \(1937\)](#); [Burroughs v. Com., 224 Mass. 28, 112 N.E. 491 \(1916\)](#).
- 5 University of Ky. v. Guynn, 372 S.W.2d 414 (Ky. 1963).
- 6 Wells by Wells v. Panola County Bd. of Educ., 645 So. 2d 883, 95 Ed. Law Rep. 1161 (Miss. 1994).
- 7 Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 64 S. Ct. 873, 88 L. Ed. 1121 (1944); [State Highway Dept. of Ga. v. McClain, 216 Ga. 1, 114 S.E.2d 125 \(1960\)](#); [Land Holding Corp. v. Board of Finance and Revenue, 388 Pa. 61, 130 A.2d 700 \(1957\)](#).
- 8 City of Kenosha v. State, 35 Wis. 2d 317, 151 N.W.2d 36 (1967).

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I. States

K. Actions and Liability

2. Liability of and Actions Against States

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(5) Waiver of Immunity or Consent to Be Sued

§ 128. Waiver through participation in litigation

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West's Key Number Digest

West's Key Number Digest, [States](#) 191.6(1), 208

Forms

[Am. Jur. Pleading and Practice Forms, States, Territories, and Dependencies](#) § 26 (Answer—State's consent to suit—Acceptance of process)

Law Reviews and Other Periodicals

Kian, [Pleading Sovereign Immunity: The Doctrinal Underpinnings of Hans V. Louisiana and Ex Parte Young](#), 61 Stan. L. Rev. 1233 (2009)

Where a state may not be sued without a constitutional provision allowing a suit or the legislature's express consent,¹ a state's immunity from suit is not waived by a voluntary general appearance by the state's attorney general² or by the failure of the

state's lawyer to plead the defense of sovereign immunity.³ In some states, sovereign immunity is a jurisdictional question, which may not be waived by conduct or undermined by estoppel.⁴

Other states may waive immunity from suit, or consent to be sued through conduct,⁵ such as by voluntarily asking to be made a party to litigation⁶ or by failing to raise the defense⁷ in a timely manner.⁸ Thus, where sovereign immunity is an affirmative defense that does not affect a court's subject matter jurisdiction, it may be waived unless it is pleaded as any other affirmative defense.⁹ It must similarly be raised if it deprives the court of personal jurisdiction over the state.¹⁰

The burden of establishing 11th Amendment immunity is on the state, and the defense is waived if it is not raised.¹¹ However, so long as the 11th Amendment defense is raised at the earliest possible opportunity, such as in the answer, consent to suit in federal court will not be found.¹² Thus, participating in administrative proceedings is not a waiver of sovereign immunity where the State raised the defense at its first opportunity to do so in the resulting court adjudication.¹³

By filing a proof of claim in bankruptcy, a state waives immunity with regard to claims that arose out of same transaction or occurrence,¹⁴ at least to the extent of any offset.¹⁵

CUMULATIVE SUPPLEMENT

Cases:

A federal court can raise the question of Eleventh Amendment sovereign immunity *sua sponte* because it implicates important questions of federal-court jurisdiction and federal state comity. [U.S.C.A. Const. Amend. 11. Zdebski v. Schmucker](#), 972 F. Supp. 2d 972 (E.D. Mich. 2013).

State's efforts to defend itself in an action brought in the circuit court do not result in waiver or forfeiture of the State's statutory immunity because only the legislature itself can determine where and when claims against the State will be allowed. *Leetaru v. Board of Trustees of University of Illinois*, 378 Ill. Dec. 934, 5 N.E.3d 314, 302 Ed. Law Rep. 754 (App. Ct. 4th Dist. 2014).

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Footnotes

1 § 121.

² Henderson v. Department of Correctional Services, 256 Neb. 314, 589 N.W.2d 520 (1999).

³ Department of Public Safety and Correctional Services v. ARA Health Services, Inc., 107 Md. App. 445, 668 A.2d 960 (1995), judgment aff'd, 344 Md. 85, 685 A.2d 435 (1996).

⁴ Sovereign immunity is not a defense that must be affirmatively pleaded. *Lorenz v. New Hampshire Administrative Office of the Courts*, 152 N.H. 632, 883 A.2d 265 (2005), as modified, (Feb. 16, 2006). *Lorenz v. New Hampshire Administrative Office of the Courts*, 152 N.H. 632, 883 A.2d 265 (2005), as modified, (Feb. 16, 2006).

A constitutional provision prohibiting suits against the state affects subject matter jurisdiction, which may not be waived or confirmed by consent. *Fu v. State Board of Ed.*, 2011 WL 4790625 (Ala. 2011).

not be waived or conferred by consent. *Ex parte Boaz City Bd. of Educ.*,
Forrell v. Department of Transp., 334 N.C. 650, 425 S.E.2d 309 (1993).

⁵ *Ferrin v. Department of Transp.*, 35 F.F.3d 336, 435 U.S.2d 333 (1995).

⁶ Richardson v. Fajardo Sugar Co., 241 U.S. 44, 36 S. Ct. 476, 60 L. Ed. 879 (1916); *People of Porto Rico v. Ramos*, 222 U.S. 627, 34 S. Ct. 461, 58 L. Ed. 762 (1914).

- 7 Wisconsin Dept. of Corrections v. Schacht, 524 U.S. 381, 118 S. Ct. 2047, 141 L. Ed. 2d 364 (1998).
8 Sea Hawk Seafoods, Inc. v. State, 215 P.3d 333 (Alaska 2009).
9 Sea Hawk Seafoods, Inc. v. State, 215 P.3d 333 (Alaska 2009).
10 PRN Associates LLC v. State, Dept. of Admin., 2009 WI 53, 317 Wis. 2d 656, 766 N.W.2d 559 (2009).
11 Barker v. Goodrich, 649 F.3d 428 (6th Cir. 2011).
12 Raygor v. Regents of University of Minnesota, 534 U.S. 533, 122 S. Ct. 999, 152 L. Ed. 2d 27 (2002).
13 Taylor v. U.S. Dept. of Labor, 440 F.3d 1 (1st Cir. 2005).
14 In re Harleston, 331 F.3d 699 (9th Cir. 2003).
15 In re Charter Oak Associates, 361 F.3d 760 (2d Cir. 2004).

As to immunity with regard to setoffs, see [Am. Jur. 2d, Counterclaim, Recoupment, and Setoff § 63](#).

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I. States

K. Actions and Liability

2. Liability of and Actions Against States

b. Sovereign Immunity

(5) Waiver of Immunity or Consent to Be Sued

§ 129. Waiver through entry into contract

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West's Key Number Digest

West's Key Number Digest, [States](#) 191.6(1), 191.9(1)

Law Reviews and Other Periodicals

DeLuccio, [Keys to the Kingdom: The Need for Judicial Reform of Contractual Sovereign Immunity in Texas](#), 46 [Hous. L. Rev.](#) 1641 (2010)

The view has been followed that a suit may not be maintained on a contract against a state unless the legislature has waived sovereign immunity.¹ Some states implicitly waive sovereign immunity by expressly entering into a valid contract.² Another state, by contracting with a private citizen, waives only its immunity from liability and not its immunity from suit.³ Still another may be sued on its contracts in its own courts even if satisfaction of a judgment depends on the willingness of the legislature to accept the judgment and provide for payment.⁴

A general statute allowing the State to enter into contracts implies a waiver of sovereign immunity by the legislature when the State is sued for breach of that contract.⁵ However, some statutes authorizing an officer to negotiate contracts do not waive sovereign immunity by necessary implication nor grant the officer the power to waive it.⁶

Observation:

Some states have enacted statutes permitting suits against the State arising out of contracts.⁷

Sovereign immunity may be waived with regard to claims of breach of a written contract⁸ although not with regard to a breach of an implied term or condition of a warranty or contract.⁹

CUMULATIVE SUPPLEMENT

Cases:

Lottery ticket constituted an express, written, signed contract, and thus State lottery corporation was not entitled to sovereign immunity in petitioner's breach of contract action after corporation denied petitioner's claim for a lottery prize; corporation issued written lottery tickets, by buying a lottery ticket, a lottery player accepted corporation's offer of a chance to win a prize under the terms printed on the ticket, by issuing and selling the ticket, corporation assented to the terms of the contract, and thus the elements of offer, acceptance, and assent of both parties to the terms of the contract were present. [Ga. Const. art. 1, § 2 para. 9; Ga. Code Ann. § 13-3-1. Georgia Lottery Corporation v. Patel, 349 Ga. App. 529, 826 S.E.2d 385 \(2019\).](#)

State Contract Claims Act authorizes suits for contract claims against the State, in derogation of the State's sovereignty. West's [Neb.Rev.St. § 81-8,306. Zawaideh v. Nebraska Dept. of Health and Human Services Regulation and Licensure, 285 Neb. 48, 825 N.W.2d 204 \(2013\).](#)

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Footnotes

1 [Magnetti v. University of Maryland, 402 Md. 548, 937 A.2d 219, 228 Ed. Law Rep. 327 \(2007\); Texas A & M University System v. Koseoglu, 233 S.W.3d 835, 224 Ed. Law Rep. 985 \(Tex. 2007\).](#)

2 [Ace Flying Service, Inc. v. Colorado Dept. of Agriculture, 136 Colo. 19, 314 P.2d 278 \(1957\); Whitfield v. Gilchrist, 348 N.C. 39, 497 S.E.2d 412 \(1998\); Disney v. Reisch, 2008 SD 72, 754 N.W.2d 813 \(S.D. 2008\).](#)

3 [Ben Bolt-Palito Blanco Consol. Independent School Dist. v. Texas Political Subdivisions Property/Cas. Joint Self-Insurance Fund, 212 S.W.3d 320 \(Tex. 2006\).](#)

As to the distinction between the two types of immunity, see § 103.

4 [P. T. & L. Const. Co. v. Commissioner, Dept. of Transp., 55 N.J. 341, 262 A.2d 195 \(1970\).](#)

5 [Knowlton v. Attorney General, 2009 ME 79, 976 A.2d 973 \(Me. 2009\).](#)

6 [Envirotest Systems Corp. v. Commissioner of Motor Vehicles, 293 Conn. 382, 978 A.2d 49 \(2009\) \(noting that contract language cannot overcome the statute's plain language in this regard\).](#)

- 7 Chun v. Board of Trustees of Employees' Retirement System of State of Hawai'i, 106 Haw. 416, 106 P.3d 339 (2005); Fulmer v. State, Dept. of Wildlife and Fisheries, 68 So. 3d 499 (La. 2011), cert. denied, 132 S. Ct. 1622 (2012); Department of Public Safety and Correctional Services v. ARA Health Services, Inc., 107 Md. App. 445, 668 A.2d 960 (1995), judgment aff'd, 344 Md. 85, 685 A.2d 435 (1996); King v. State, 260 Neb. 14, 614 N.W.2d 341 (2000); Lorenz v. New Hampshire Administrative Office of the Courts, 152 N.H. 632, 883 A.2d 265 (2005), as modified, (Feb. 16, 2006) (limited to recovery of damages); Effertz v. North Dakota Workers' Compensation Bureau, 481 N.W.2d 223 (N.D. 1992); Brown v. Moore, 973 P.2d 950 (Utah 1998).
- 8 Board of Regents of University System of Georgia v. Ruff, 12 Fulton County D. Rep. 1013, 2012 WL 851514 (Ga. Ct. App. 2012).
- 9 City of Jackson v. Estate of Stewart ex rel. Womack, 908 So. 2d 703 (Miss. 2005).

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